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Walking the Tightrope of Justice: an examination of the Office of the Attorney General

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Royal Commission on
Donald
Province

Walking the Tightrope of Justice

An examination of the Office of Attorney General in Canada with Particular Regard to its Relationships with the Police and Prosecutors and the Arguments for Establishing a Statutorily Independent Director of Public Prosecutions

A Series of Opinion Papers

Prepared for
Royal Commission on the Donald Marshall, Jr., Prosecution

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This research represents the views of the researcher and not necessarily those of the Commissioners.

The Findings and Recommendations of the Commissioners are found in Volume 1 of the Report.

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Preface

Many inherent qualities, it may be surmised, are essential if public confidence in the administration of justice is to be sustained. Nowhere is this more evident than in the institution and conduct of criminal prosecutions. Among the central criteria by which the justice system is publicly judged are fairness and evenhandedness in the handling of the criminal proceedings, the absence of any perception of bias or political interference on the part of those exercising police and prosecutorial authority, as well as professional competence and integrity throughout the system. Not infrequently, the public focus is directed towards the highest echelons in the system and this perforce includes the Attorney General and the senior public officials in the department of government responsible for the machinery of justice.

Such has been the experience in recent years of several of the Canadian provinces, from the east coast to the west coast, but none have had to endure the intensity and depth of the public inquest established by the Government of Nova Scotia into all the circumstances surrounding the Donald Marshall, Jr., prosecution. This has led this Royal Commission to expand the range of its inquiry into all facets of the current provincial justice system and, in particular, the handling of other cases involving prominent political figures. Whatever the outcome of this prolonged public examination may be, and whatever recommendations emanate from this Royal Commission, it can be stated with total confidence that the ensuing implications will affect the future justice policies of every jurisdiction in Canada, federal as well as provincial.

The series of opinions contained in this volume represent my endeavours to assist the Commission of Inquiry in identifying the major points of weakness in the prevailing constitutional systems relating to the investigation and prosecution of crime. The opinions build upon my previous work as reflected in "The Law Officers of the Crown" (1964) and "The Attorney General, Politics and the Public Interest" (1984), both of which centred, in the main, on the English offices of the Attorney General, Solicitor General and Director of Public Prosecutions. It is to be noted, however, that the direct historical lineage between the original office of the Attorney General in England and Wales and that of its Canadian counterparts is expressly acknowledged in every federal and provincial statute that defines the functions, powers and responsibilities of the Attorney General in our constitutional arrangements. Accordingly, much attention is devoted in the chapters that follow to assessing the experience of the wide range of countries, throughout the Commonwealth and in the United States of America, which have adapted the role of the Attorney General to meet their individual circumstances.

A short while before my present association with this Royal Commission began, in the course of the Tenth Viscount Bennett Memorial Lecture at the University of New Brunswick in October 1986, I set forth some of the specific recommendations for change that I regarded as necessary conditions for the restoration of waning public confidence in the integrity of the justice system. Some of the provincial governments have seen fit to publicly adopt these suggestions for reform, or to indicate their intention of so doing. I cannot help, however, harbouring reservations as to the level of understanding that accompany the proposed reforms. Among the major questions that need to be addressed in any restructuring of the machinery of government in the justice area is the separation of ministerial responsibility, respectively, for policing and prosecutions, and determining the parameters for the new alignments. This move, begun by the federal government in 1966, has now been implemented by the majority of the provinces.

Another, and perhaps more contentious, issue is the problem whether to transform the office of Attorney General into a non-political, public service appointment or to retain its traditional status, so far as Canadian history is concerned, as an elective member of the Government, with a seat in the legislature and in the Cabinet. This subject, and the arguments that can be advanced in support of both sides of one of the central questions facing the Commission, *viz.*, the future role of the Attorney General in Nova Scotia, are canvassed fully in the concluding chapters of the present study. At the end I come down in favour of retaining the *status quo* so far as the Attorney General's membership in the Cabinet and the legislature is concerned. If the experience of a broad range of Commonwealth countries is reviewed, in which both the non-political and political models of the Attorney General's office are exemplified, the conclusion is inescapable that adherence to the fundamental qualities of independence and accountability are pre-eminently dependent upon the personal attributes and standards of the holder rather than adherence to an ostensibly non-partisan, non-political office of Attorney General. Even were the latter option to attract favourable support, if we accept the doctrine of ministerial responsibility to the legislative body as the bedrock of our system of parliamentary democracy, another Minister of the Crown would have to be designated in place of the Attorney General with all the same fundamental issues of direction and control remaining to be determined.

Far from dismissing constitutional principles and legislative prescriptions as important safeguards against abuses in the administration of justice, I devote considerable time in the opinions that follow to an analysis of the office of Director of Public

Prosecutions as it has evolved in England, its original home, in many of the newly independent countries of the Commonwealth, and, notably in more recent years, in Australia at both the federal and state levels. It is worth noting at once that, during the period in which the present inquiry has been engaged in fulfilling its mandate, both the Premier of Nova Scotia and the Attorney General have publicly stated their ideas as to what changes would be necessary to avoid a repetition of the allegations associated with a number of high profile prosecutions in that province. At different times the emphasis has inclined towards the setting up of an independent Director of Public Prosecutions who would "report directly to the Legislature and have the same independence as the Auditor General and the Ombudsman". An alternative proposal has envisaged the creation of a United States style Special Prosecutor's office - presently described as the office of Independent Counsel under U.S. federal laws - with more limited jurisdiction to handle politically sensitive prosecutions that involve senior officials in government. As will be seen in the ensuing series of opinions I reject both these proposed solutions as inadequate to the pressing problems portrayed in the evidence tendered before this Royal Commission.

In my recommendations to the Royal Commission I have sought to adhere closely to the dual objectives of, first, ensuring ministerial accountability on the floor of the legislature, and since the advent of the Charter in the courts, for the exercise of prosecutorial power, and, secondly, reinforcing the realities of independence with respect to the handling of individual cases by the creation of a statutory office of Director of Public Prosecutions. I emphasize the statutory nature of the proposed office to distinguish it from the existing office that, in various provinces across Canada, bears the same title but which is held by a public servant with no statutory authority or security of tenure in his own right. I reject the notion of a Director of Public Prosecutions who is absolutely independent operating outside the ambit of the principles of ministerial responsibility. In short, the Attorney General will remain as the Minister of the Crown ultimately responsible to the legislature for the handling of every prosecution instituted or terminated at the instance of the State.

What is proposed is an office of Director of Public Prosecutions with functions, powers and lines of accountability spelt out in careful detail by way of a statutory enactment, and who will on a daily basis preside over the entire system of public prosecutions. Normally, the Attorney General should not be involved at all in the making of prosecutorial decisions. In the event, however, that extraordinary considerations affecting the public interest induce the Attorney General to assume his ultimate authority, the governing statute will require the Attorney General to commit his directions to writing and

then ensure that these instructions are promptly tabled both in the legislature and in the most publicly accessible source of information as to the activities of the government, such as the *Royal Gazette*. Parallel with this recommendation is the need to publish for general consumption the Attorney General's guidelines that spell out the policies and considerations governing prosecutorial discretion. An encouraging beginning in this direction, in some parts of Canada, has already taken place. It is hoped that more will follow as the philosophy of greater openness gains wider recognition. The statutory procedures outlined in the concluding parts of this study will ensure that there is the fullest measure of public accountability, the proper insulation of the Director of Public Prosecutions from potentially damaging political interference, and at the same time the safeguarding of the Attorney General's ultimate powers of direction consonant with his constitutional responsibilities for the administration of justice.

John Ll. J. Edwards
March 21, 1989

I

Issues that Relate to the Creation of the Office of Solicitor General in Nova Scotia and Their Relevance to this Royal Commission

1.1
Rationale for the creation of a Department of the Solicitor General in charge of police forces

On November 24, 1987, the Premier of Nova Scotia, Mr. John Buchanan, announced in a press release the Government's intention to create a new Department of the Solicitor General with responsibility for the supervision of policing and corrections in the Province. The announcement, which formed part of a reorganization that involved many departments, was made without any public explanation for the move. The press release read as follows:

"To ensure the best possible system of justice in Nova Scotia, I am realigning the functions of the Attorney General and establishing a new Ministry of the Solicitor General."

"The Attorney General will have the responsibility for courts and prosecutions, while police and corrections will come under the jurisdiction of the Solicitor General."

The subsequent Order in Council 87-1455, dated December 3, 1987, adds very little to our understanding of what prompted the sudden act of political surgery by Mr. Buchanan but its exact terms deserve to be noted. The relevant sections with the enabling preamble declare:

"The Governor in Council on the report and recommendation of the President of the Executive Council dated the 24th day of November, 1987 pursuant to the Public Service Act *and all other authority in him vested, is pleased to order that.....*

(18) The Department of the Solicitor General is established and shall be presided over by the Solicitor General who has responsibility for the supervision, direction and control *of affairs and matters relating to police and corrections and such other matters as may be assigned by the Governor in Council* (my emphasis).

(19) Affairs and matters relating to police and corrections which have heretofore been the responsibility of the Attorney General are assigned to the Solicitor General, and the Attorney General shall retain responsibility for affairs and matters relating to courts and prosecutions."

It remains to be seen what language is used in any statute that incorporates the above transfers of ministerial functions. For the present it is important to note the explicit terms used by the Order in Council to define the scope of the Solicitor General's mandate. I understand that this Royal Commission's request to the Government

for copies of any background briefing papers or in-house studies pertaining to the separation of policing and corrections from the Department of Attorney General, has confirmed the absence of any principled examination of the consequences that are likely to flow from this realignment of ministerial responsibility for policing within the Province of Nova Scotia. The vacuum in governmental consideration of any of these important issues, coupled with the changes attendant on establishing a new Department of the Solicitor General while this Royal Commission is still sitting, makes it imperative that the Commissioners direct their attention to the questions that will be considered in this opinion.

Since my own views have frequently been cited (most recently in the Law Reform Commission of Canada's Draft Working Paper on "The Powers of the Attorney General") in support of the reorganization of ministerial responsibility for different segments of the administration of justice, I shall begin by recalling these views which were first publicly expressed in 1965. Speaking in the course of a University lecture on "Penal Reform and the Machinery of Justice" I stated:

"Finally, I should like to draw attention to what in theory constitutes a disturbing feature of the machinery of justice in every province. I refer to the combination in the one Minister of the Crown, the Attorney General, of indirect but ultimate control over the personnel who maintain the three constituent branches of the administration of criminal law, namely, the police forces that are responsible for the enforcement of the criminal law, the Crown Attorneys who prosecute criminal offences, and the magistracy who adjudicate upon the cases that concern the Crown and the individual offender. The history of other countries at least suggests the possible dangers that such a combination of power in the one department of government can create.

Given the personal qualities of integrity, and a proper understanding of the fundamental need to keep distinct the operation of the separate organs and to ensure that those who fulfill these responsibilities are allowed to do their work free from any suggestion of improper influence from any quarter, the danger may never protrude itself into public notice. But should it do so, we may well find ourselves directing our attention to the existing machinery and asking the pertinent question: what steps might be taken to minimize the possibility of any conflict of interest arising within the Department for which the Attorney General is constitutionally responsible. Should the state, in effect, be content to rely upon the personal qualities of the incumbent who occupies the office of the

Attorney General, and likewise those of his permanent staff? The alternative course of action, for which I believe the time is now opportune, is to heed the lessons of the Dorion Inquiry and, in an atmosphere devoid of party political prejudices, to subject the administration of criminal justice in the provinces to independent examination." ((1965-66) 8 Crim. L.Q. 404 at pp. 425-426)

Enlarging on this approach a few years later I endeavoured to spell out with more precision the principles that should govern a Minister's statutory powers of supervising the police forces under his jurisdiction. Because of its relevance to the emerging Department of the Solicitor General in Nova Scotia I will quote the pertinent extracts in full. Speaking in 1969, I observed:

"Nothing is more calculated to engender disillusionment with the criminal justice system and its constituent parts - the police, prosecutors, judges or the executive branch of government - than disclosures indicating a susceptibility to extraneous pressures. I have no doubt in my mind that the greatest safeguard against the sullying of the pillars of justice is to be found in the integrity and independence of the individuals who, in their respective capacities, have to administer the several parts of the system. Without these personal qualities any structure is extremely vulnerable. The responsibility of government is to create the kind of machinery that will assist, rather than prejudice, the fulfillment of those ideals which are essential to maintaining public confidence in the criminal justice system. An important step in this direction would be realized by separating the portfolio of the Attorney General from that of the Minister of Justice and by making the Minister of Justice the member of the Government answerable for the courts and the police. In addition to emphasizing the distinctive functions of the two ministers this separation will serve to ensure that the Attorney General concentrates his efforts on being the principal legal adviser to the Government, on supervising the entire machinery of criminal prosecutions, on ensuring through the Law Reform Commission that the statute law is kept abreast of modern needs, as well as fulfilling the historic role of the Attorney General as the guardian of the public interest in all matters coming before the courts or administrative tribunals.

In wishing to see the police forces become the responsibility of the Minister of Justice, rather than the Attorney General, I am by no means advocating the assumption of direct supervisory powers by the Minister over the day-to-day activities of the various police forces. This would be as much anathema to my way of thinking as

the policy presently being advocated in many quarters, of a return to the system of control over local police forces by commissions or committees composed of a majority of elected representatives drawn from the local municipal council. Past history suggests that this path leads to the erosion of the independent exercise by the police of their statutory and common law powers. To my mind the arguments against permitting the resurgence of local politics and political interference in the area of law enforcement far outweigh the criticisms levelled against the present system of police commissions. If there have been occasions when the police commission of a particular city or municipality has been impervious to requests for information made by the responsible Minister, it is time to reassert the ultimate accountability of the police and the police commissions at all levels to the Legislature. Undue restraint on the part of the Minister concerned in seeking the facts can be as much a fault as undue interference in the work of police commissions. The existing framework, at least in this province [Ontario], provides the right kind of checks and balances that are so necessary to ensure the impartial application of the criminal law. If some changes are felt to be necessary in the composition of these local supervisory bodies great care must be exercised not to mutilate the essential foundations of the police commission system." ((1969-70) 12 Crim. L.Q. 417 at pp. 424-425)

It will be noted that the Government of Nova Scotia, like some other provinces, has chosen to designate the Solicitor General as the responsible Minister to be in charge of policing in the province, whereas my recommendation had been to assign this duty to the Minister of Justice, using that title in contradistinction to the office of Attorney General. Later on I shall revert to this question of nomenclature, believing as I do that the use of the title Solicitor General, as illustrated in many parts of Canada, is a serious distortion of the true character of that office with its long history - in Canada no less than in England and Wales where the office first appeared in the 15th century - of being the deputy, in every sense of that word, to the Attorney General.

1.2
The 1966 decision by the Government of Canada to create a separate Ministry of the Solicitor General

Leaving aside for the moment my objections to the use of the Solicitor General's title in a context that is entirely foreign to its evolution, it is impossible to ignore the current trend within Canada and which is peculiar to this country. It commenced with the Federal Government's decision in 1966 to divide the responsibilities of the Minister of Justice and Attorney General of Canada, in charge of the Department of Justice, by creating a new Ministry of the Solicitor General of Canada with supervisory powers over the RCMP and the federal police force, coupled with penitentiaries and parole.[1]

Perhaps the most illuminating contribution to the House of Commons debates on the setting up of the new Ministry of the Solicitor General came from Mr. Larry Pennell, the minister appointed to preside over the new department. Referring specifically to the removal of the RCMP from the jurisdiction of the Department of Justice, the Solicitor General explained:

"Under the new bill there will now be a separation of the investigative functions of the police from the process of prosecution in the courts. It seems to me that to vest the authority for the investigative functions of the government in the same person who is going to conduct the criminal process is foreign to the spirit of justice. Under the proposals set forth in this bill the RCMP will carry out its investigations under the authority of the Solicitor General. But...the decision whether or not the facts disclosed by the investigation merit the commencement of a criminal prosecution will continue to be taken by the Minister of Justice in his capacity as Attorney General. Thus two sets of minds and two sets of responsibilities will be involved. It is my hope and belief that the efficiency of the criminal law process will be improved as a result... I would point out that the separation of the police and the Attorney General has for some time been and continues to be the practice in the United Kingdom. There the Home Secretary is the minister responsible for the police but the public enforcement of the criminal law in the courts remains the responsibility of the Attorney General." (H.C. Debates, Vol. V, p. 5524, May 25, 1966)

For his part, the then Minister of Justice, Mr. Cardin, went out of his way to stress that the Minister of Justice, presumably in his *ex officio* capacity as Attorney General of Canada, would remain solely responsible for determining whether, as the result of any investigation made by the RCMP or other agency charged with regulatory or investigative responsibilities under the law, there is a case for prosecution and for initiating the prosecution in all instances where this action lies within federal jurisdiction.

Given the changed circumstances where the RCMP is the contract

1. I have described the background to this precedent setting reorganization within the Government of Canada in my study for the McDonald Commission on the RCMP Security Service, entitled "*Ministerial Responsibility for National Security*" (1980) pp. 25-34. Reference should also be made to the "Second Report of the McDonald Commission" (1981) Vol. 1, pp. 80-81 and Vol. 2, pp. 859-860.

police force in a province, has the establishment of a Department of the Solicitor General in Nova Scotia generated new dimensions in the relationship between the RCMP and the Attorney General of the province? How far is the constitutional doctrine enunciated in 1966 by the federal Minister of Justice transposable to a provincial context and, in particular, to the Nova Scotia? For the present, we can take note of these questions, which I propose to analyze more fully in a later section of this opinion and after reference has been made to the changes introduced in other provinces which have already introduced major reforms in their criminal justice systems. To revert to the House of Commons debates in 1966, Mr. Cardin saw the Government's reorganization in markedly different colours from those advanced by his colleague, the Solicitor General. According to the Minister of Justice:

"...in essence, [the proposed changes] are designed, to enable the Department of Justice to concentrate its full resources on those problems and tasks which, by the terms of the Department of Justice Act, *1868, were intended to fall within its purview. While the character of the department has not undergone any significant change since it came into being nearly a hundred years ago, the addition of other responsibilities - some closely related to its basic functions, others not so readily identifiable - has made it increasingly difficult for the Minister of Justice and Attorney General of Canada to perform his important duty as the principal law officer of the Crown."* (H.C. Debates, Vol. III, p.1680, Feb. 23, 1966)

A few years earlier, in 1962, the Glassco Royal Commission on Government Organization had taken a close look at the Department of Justice but nowhere in its final report is any reference made to the pressing need to dissociate any major responsibilities from the shoulders of the Minister of Justice and Attorney General of Canada. The conclusion is inescapable that the reorganization introduced in 1966, from which the new Ministry of the Solicitor General emerged, was not dictated by the pressing circumstances outlined in the Minister of Justice's speech in the Commons and quoted above. It may be purely coincidental that a similar scenario is detectable in the action taken recently by the Premier of Nova Scotia in excising from the portfolio of the Attorney General one of the major components of the office's responsibilities. Whatever the actual reasons may be, the division of those functions and the assignment of policing matters to the new Department of the Solicitor General requires that we seek additional enlightenment from the advent of similar changes in other provinces.

1.3 The experience of Ontario, Alberta, Quebec and New Brunswick in effecting similar changes with respect to policing responsibilites

Ontario

The Government of Ontario in 1972 was the first province to follow the example set by the Federal Government in establishing a separate Ministry of the Solicitor General. In its *Government Reorganization Act* (S.O. 1972, c.1, s.97), the new Ministry was empowered to exercise supervisory duties for all the police forces in the province in accordance with the provisions of the Ontario *Police Act*. At the same time, it was made clear that responsibility for the entire machinery of prosecutions in Ontario was to remain vested in the province's Attorney General. Nevertheless, when the Bill to establish the new Ministry came before the legislature for second reading, the minister-designate was hard pressed to advance any substantial reasons by way of explanation for the Government's new measure. In what seemed like a desperate attempt at rationalization the Solicitor General designate adverted to the recommendations of the Committee on Government Productivity, composed of senior public servants and business executives, which had been appointed in 1969 to investigate the management of the Government of Ontario with a view to improving its efficiency and effectiveness.

In its 1971 Interim Report the Committee had advocated the setting up of a Ministry of Public Protection which, together with the existing Ministries of the Attorney General and Correctional Services, should constitute the Justice triumvirate in the proposed reorganization of the Government of Ontario. The experience with policy coordinating ministries in Ontario or elsewhere has not been particularly happy or successful but, I suggest, that has only a slight bearing on any recommendations that this Royal Commission may wish to make in its final report. What was foreshadowed as the Ministry of Public Protection eventually emerged as the new Ministry of the Solicitor General. There is little evidence available on which to judge the impact on policing and prosecutions, especially in the interface between these respective functions, which can be related directly to the 1972 legislation in Ontario. Significantly, however, there was considerable criticism, voiced inside and outside the legislature, when the Premier, Mr. William Davis, saw fit to require that the Attorney General, Mr. Roy McMurtry, act for four years (1978-82) in the dual capacity of Attorney General and Solicitor General. Originally, the dual appointments were designed to meet an emergency situation but later the extension was justified by the Premier on the ground that Mr. McMurtry was "the best man for the job". The basic ground for the public criticism was the perception that the whole purpose of the 1972 separation of the two offices was being nullified, inasmuch as its main underlying objective was to remove the conflict of purposes

that was inherent in the pre-1972 system. Any future attempt to replicate the McMurtry precedent in the late 1970s would very likely evoke a strong protest, such is the sensitivity of public opinion, at least in Ontario, on this subject.

Quebec

It has taken the Province of Quebec a little longer to implement the changes foreshadowed in its Government White Paper entitled "The Police and the Citizens' Security" which was issued in July 1971. It should first be mentioned that, in the political atmosphere of the period in question, it came as no surprise that the Quebec Government enacted legislation in 1965 (S.Q. 1965, c.16) that conferred upon the Attorney General of the province the title of Minister of Justice, tailoring itself upon the federal model. Ontario, not to be outdone, quickly followed suit in 1969 (S.O. 1968-69, c.27), reconstituting the former Ministry of the Attorney General as the provincial Ministry of Justice. Henceforth, it was proclaimed, the Attorney General of Ontario was to be known as the Minister of Justice and continue *ex officio* to be the province's Attorney General. With less time than it took everyone to adjust to the change in the title of the Ministry responsible for all aspects of the administration of justice in the province, the Government in 1972 (S.O. 1972, c.1) quickly performed a *volte face* and reverted to the old titles of "Attorney General" and "Ministry of the Attorney General". The same legislation, as already explained, brought into being a provincial Ministry of the Solicitor General. That remains the position today in Ontario.

Meanwhile, the Quebec Government's thinking on the problems associated with integrating in the one Minister responsibility for the police, prosecutors and the lower judiciary was being clearly articulated in its 1971 White Paper. Adverting specifically to the changes wrought by the creation of the federal Ministry of the Solicitor General in 1966 the Quebec White Paper stated:

"Under present conditions, the Justice Minister and Attorney General is wholly responsible for law and order in the Province of Quebec. There are two solutions as to whom should fall the responsibility over the police forces in general, either to the Justice Minister or to a minister specially entrusted with police matters. The first solution has the advantage of offering a specialized department and so to free the Justice Minister from contingencies due to police action, considering his natural role as an arbitrator. The second solution is called for, not only because it has the advantage of not linking justice with police action but also for

practical reasons which are due to the extremely wide range of the Justice Department and the responsibilities of its incumbent. This solution was adopted at the federal level where the Solicitor General has responsibility over the RCMP. A like solution was also adopted in France and in England where responsibility over police matters rests either with the Home Secretary or with the Minister of the Interior, as the case may be."

The parallel drawn in this passage to the constitutional allocation of functions in England, with particular reference to the Home Secretary's responsibilities for the police, justifies a separate treatment of this subject later in this opinion. In it, I propose to delineate the boundaries that identify the separate roles of the Attorney General and the Home Secretary with special reference to the investigation and prosecution of crimes. This central question is of pressing concern to this Royal Commission but it becomes all too evident that little guidance by way of examining the underlying theories is to be found in either governmental literature or the ministerial pronouncements that accompany the changes presently being reviewed.

In anticipation of resistance to the immediate implementation of its recommendation that a separate Ministry for policing matters be established, the Quebec White Paper of 1971 urged "that there be set up a headquarters for police matters, under the authority of a deputy minister responsible for police matters, that will come under the Justice Minister until a separate department has been set up." This interim organization prevailed until 1986 when the final step was taken of assigning all responsibility for administering and supervising the administration of the laws respecting the police to a new Ministry of the Solicitor General (S.Q. 1986, c.86). In defining the duties and powers of the Minister the enabling Act requires the Solicitor General "to devise and propose to the Government policies relating to the maintenance of public safety, to crime prevention, to the implementation and improvement of methods of crime detection and repression and to imprisonment and social rehabilitation of inmates". The more specific definition of the Minister's relationship to the police requires reference to the provincial *Police Act* (R.S.Q. 1977, c. P.13) which states: "The Attorney General [now the Solicitor General] shall have charge of the carrying out of this Act" (s.101). Far from invoking the language of "directing and controlling", the same statute, referring to the Quebec Provincial Police ("Sûreté du Québec"), declares that "The Police Force, *under the authority of the Solicitor General*, shall be charged with maintaining peace, order and public safety in the entire territory of Quebec, preventing crime

and infringements of the Laws of Quebec and seeking out the offenders" (s.39). (my emphasis)

There is not the space in this opinion to explore the earlier history of the office of Solicitor General before Confederation when the holder was to be found, in both Lower and Upper Canada, occupying a seat on the Executive Council. The demise of the office in Quebec in 1888 was to continue in effect until 1964 when it resurfaced in the *Executive Powers Act* (S.Q. 1964, c.9). According to that enactment the Solicitor General of Quebec was expected "to act as attorney and counsel and to appear before the courts, at the request of the Attorney General, and in any legal matter or judicial proceeding the conduct of which belongs to the Attorney General". Furthermore, the Solicitor General was required "to fulfill such other functions and duties of a legal or juridical nature as the Lieutenant Governor in Council may assign to him" (*ibid.*, s.5). All this is cast in a traditional mold with the Solicitor General being looked upon as the Attorney General's principal deputy. These provisions were repealed in 1986 as part of the Act setting up the new Ministry of the Solicitor General for Quebec (S.Q. 1986, c.86, s.24). Gone therefore are the possibilities of a conflict in ministerial duties which might have arisen had both formulations of the Solicitor General's functions been allowed to stand on the statute book. To discover precisely such a situation we must look to Alberta.

Alberta

Alberta's action in 1973, in establishing a Department of the Solicitor General, followed hard on the heels of Ontario's initiative but the approach adopted is no mere replication of the earlier legislation. Thus, whereas the Ontario statute setting up the Ministry of the Solicitor General was content to ascribe to the new member of the Executive Council responsibility for the administration of a motley collection of provincial enactments concerning public safety and protection, foremost among these being the *Police Act*, the Alberta *Department of the Solicitor General Act* (S.A. 1973, c.67) reflects a potential source of major conflicts in the exercise of the Solicitor General's ministerial responsibilities. Thus, on the one hand, the Solicitor General of Alberta is charged with supervising the administration of the province's *Police Act* and *Liquor Control Act* as well as the various correctional facilities and services that fall under provincial jurisdiction. In this respect, Alberta adheres to the model that was followed by the Federal Government in 1966 and which, if the initial announcement by Premier John Buchanan is to be reflected in the ensuing legislation, will be adhered to in Nova Scotia when the

reorganization of the Department of Attorney General ultimately takes effect.

What, on the other hand, distinguishes the approach contained in the Alberta statute is the provision in Section 3 of the Act which stipulates:

"The Solicitor General shall exercise the powers and is charged with duties attached to the Office of the Solicitor General of England by law or usage insofar as those powers and duties are applicable to Alberta and are not assigned to any other Minister."

Historically and continuously up to the present time the Solicitor General of England is regarded as the deputy, in every sense of the word, to the Attorney General. Together they constitute the Law Officers of the Crown tendering legal advice to the Government and its Ministers, representing the Crown in civil suits and exercising the superintendence over the Director of Public Prosecutions and the newly established Crown Prosecution Service. Both Law Officers function in the closest proximity to one another in the Attorney General's Chambers in the Royal Courts of Justice. Neither has any responsibility for police matters but in the area of prosecutorial decision-making the Solicitor General, as the principal deputy to the Senior Law Officer of the Crown, is empowered to act to the extent that the Attorney General sees fit to delegate his powers or in circumstances where the Attorney General becomes incapacitated or is temporarily absent from the country.

Not only, therefore, is the provision quoted above from the Alberta statute of potential significance where the Solicitor General's exercise of his police and prosecutorial powers may come into conflict, but it is also important to recognize the possibility of similar inherent conflicts arising from the *Criminal Code*'s perpetuation of the historical characteristics of the office when it defines "Attorney General," whenever provisions of the Code pertain to the powers of that office, to mean "the Attorney General and Solicitor General of a province" (see Section 2). For this and other reasons that I have argued elsewhere, it would be infinitely preferable not to use the title of Solicitor General in a manner that is capable of creating confusion and conflict. There are many alternatives that could both better describe the functions and responsibilities of the separate Ministry and, at the same time, ensure that the Office of Solicitor General remained free to assume the important functions of a second Law Officer. As it is, the growing Canadian disposition to invoke the title of Solicitor General to describe the Minister responsible for all police forces within his jurisdiction finds no parallel in any other country,

including the United States and the Commonwealth jurisdictions which have inherited the same English traditions of the common law.

It is with some satisfaction, therefore, that I note the precedent introduced by the Province of Quebec in its recently enacted Bill 81, "An Act to amend various legislation respecting public security." The measure, given royal assent in December 18, 1988, amends that province's *Executive Powers Act*, the *Government Departments Act* and the *Act respecting the Ministére du Soliciteur Général* whereby the holder of that same office is henceforward to be described as the Minister of Public Security.

New Brunswick

Shortly before Nova Scotia took steps to distance its police forces from under the control of the Attorney General, the new Liberal Government of New Brunswick, in the immediate wake of its landslide victory in September 1987, announced its intention to divide the monolithic Department of Justice into two separate departments. Under the new scheme the Attorney General will retain responsibility for prosecutions and the courts, and the new Department of the Solicitor General will assume charge of policing and corrections in the province. Given the exact parallel which this reorganization represents to the subsequent action by the Government of Nova Scotia, it could well be that Premier Frank McKenna's initiative provided the impetus for Premier John Buchanan's decision to follow suit in December 1987.

In New Brunswick the proposed changes to the Department of Justice have been the subject of intense political debate in that province for many years. Moreover, it was to be the focus of active discussion during the provincial election that resulted in the former Opposition assuming the reins of power. In his former role as Leader of the Opposition, during the latter years of the Hatfield Government, Frank McKenna had persistently argued the case for dividing the Justice Department in the manner now being implemented. A final opportunity to present these views came when the Law Amendments Standing Committee of the Legislative Assembly was asked in February 1987 to consider the advisability of separating the Office of the Attorney General from that of the Minister of Justice.

Mr. McKenna's approach to the problem is set forth in his formal submission to the Standing Committee when he declared that the reference to the Committee "did not come to you lightly. It arrived here as a result of many assaults in recent years on the integrity of the administration of justice in New Brunswick". In pointing out that the justice system in New Brunswick was very similar, and in many instances identical, to that in other provinces the Opposition Leader

concluded that "it has functioned adequately in normal circumstances but this province has, in recent years, suffered shocks that severely tried this system and found it wanting". These words would likely be echoed in many quarters in Nova Scotia, both as a result of events leading up to this Royal Commission and the testimony presented before the Commissioners.

Because of the close similarities in the experience of the neighbouring province, it may be helpful to take note of Mr. McKenna's studied analysis of the problems encountered in New Brunswick and the proposals for change which he is now in a position to put into effect. Referring in his written submission to the Standing Committee to the "unrelenting series of assaults which revealed a serious weakness and caused uncertainty and at times cynicism among our citizens about the integrity of our province's system of justice", Mr. McKenna continued, "The resulting public disillusionment caused a former Minister of Justice, Rodman Logan, to consider a commission of inquiry in 1980 to restore public respect for the justice system. This commission was designed to examine the 'responsibilities of the Department of Justice, the police and prosecutions and the relationship between the Attorney General, the Cabinet, the Legislature and the Judiciary'. Mr. Logan met with Professor John Edwards of the University of Toronto to head the commission and assigned personnel in the Department of Justice to roles associated with its functioning. As a final step, he prepared an Order in Council to give this Commission very broad powers of investigation. Unfortunately, the former Justice Minister could not obtain his Government's approval and that inquiry was never undertaken."

A few months prior to the Standing Committee's deliberations I had visited New Brunswick to deliver the Tenth Viscount Bennett Memorial Lecture at the University of New Brunswick Law School. Speaking on October 16, 1986 under the title "The Charter, Government and the Machinery of Justice", I adverted to many of the reforms which formed part of Mr. McKenna's submission to the legislative Committee.[2] Much of Mr. McKenna's programme for change was concentrated on finding ways in which to demonstrate the independence of the office of Attorney General and to protect it from partisan political pressures. This problem will form the subject of a separate opinion to this Royal Commission.

In considering the options open to New Brunswick the present Premier, writing before assuming the responsibilities of government, recognized the approach initiated by "the Government of Canada, followed by the Provinces of Alberta, Ontario and Quebec, [which] have used the office of Solicitor General as a separate Ministry with responsibilities for policing functions." In his final submissions to

2. A full text of the lecture is published in the University of New Brunswick Law Journal (1987) 36 U.N.B. L.J. 41.

the Committee, however, Mr. McKenna reminded his fellow legislators of the warnings I had uttered in my Viscount Bennett lectures when, after reviewing the various models in existence across the Commonwealth, I said: "Any precipitate decision tc effect by a single stroke the transplanting of any one of these alternative models into a province like New Brunswick, with its own indigenous political and social cultures, would almost certainly produce a worse situation than that which exists at the present. Any disposition to seek a quick, straightforward remedy should be firmly rejected." Three submissions were urged upon the Standing Committee by Mr. McKenna:

"(1) That the Office of the Attorney General be separate from the office of the Minister of Justice;
(2) That a permanent Office of Director of Public Prosecutions with statutory powers be established;
(3) A Commission of Inquiry be established to recommend the appropriate mechanism to achieve the separation of these offices."

The Attorney General at the time, Mr. David Clark, argued strongly against the policy of separation[3] but carried out what he conceived to be the bipartisan desire of the Standing Committee that the whole subject of responsibility for the various segments of the administration of justice be referred to a Royal Commission for independent examination and recommendations. The appointment of that Commission, under myself as the sole Commissioner, was publicly announced in the *Royal Gazette* dated September 23, 1987. The detailed terms of reference were contained in Order in Council No. 87-765, one of the final acts executed by the outgoing Hatfield administration. Before I had proceeded to establish the key elements in the Commission's staff and to appoint Commission counsel, the new Premier made known his Government's decision to discontinue the public inquiry. At the same time Mr. McKenna announced the establishment of a Department of the Solicitor General to take over the functions formerly associated with the Minister of Justice in the province. The Orders in Council implementing this policy decision and transferring responsibility for law enforcement matters from the Department of Justice to the new Department of the Solicitor General were effectuated in stages (see O.I.C. 87/987, 87/1034 and Regulations 88.26 to 88.30). Finally, an Act incorporating all of these prior executive changes and entitled *An Act to amend the Executive Council Act* was assented to on May 18, 1988 (S.N.B. 1988, c.11).

3. The supporting views of the then Deputy Minister, Mr. Gordon Gregory, Q.C. may be found in published form at (1987) 36 U.N.B. L.J. 59.

1.4 The relationship in Britain between the Home Secretary and the Attorney General in matters of prosecution - its bearing on recent governmental changes in Nova Scotia

In the current examination of the implications that attach to the separation from the Attorney General's Department in Nova Scotia of all future responsibility for policing matters, and the assignment of those functions to the new Department of the Solicitor General, we can expect the Government to cite in support of its decision the precedent set in Ottawa in 1966 and followed later in other parts of the country. Whether or not the Government of Nova Scotia's understanding of the full implications of that fundamental change extends to seeing the comparable position in Britain where the functions of the Attorney General and the Home Secretary are entirely separate is, for the time being, less than self-apparent. We must await the explanation that accompanies the introduction in the legislature of the Bill effectuating the Government's reorganization.

I have earlier alluded to the debates in the House of Commons surrounding the Federal Government's own *Government Organization Act, 1966*, and to the new Solicitor General's assimilation of the changes proposed by the Act to the constitutional arrangements in place in the United Kingdom. In the course of the same speech Mr. Pennell recalled that:

"It has always been thought in the United Kingdom that there ought to be an officer other than the Attorney General who is responsible for what they call preserving the Queen's peace within the realm, and that he should discharge the responsibility for the internal safety of the country, including security. It is on this basis that the Home Secretary has been responsible for the police since 1829." (loc. cit.)

The Prime Minister, Mr. Pearson, also spoke of the "course pioneered many years ago in the United Kingdom in the Home Office" and adverted to the enormous increase in the burdens of the Law Officers and the government's legal advisers. This, the Prime Minister declared, called for a radical reform of the Crown's law offices and explained that:

"On the one hand the Department of Justice and the office of the Attorney General of Canada will be returned to the full time discharge of their traditional functions in the drafting of legislation and documents; the conduct of litigation and prosecutions... The RCMP, criminal investigations, detentions, paroles and pardons, on the other hand, will be the full time responsibility of the Solicitor General in a department which, like the Home Office in Britain, will be separate and distinct from that of the Attorney General." (H.C. Debates, Vol. I, pp. 4873-4, May 9, 1966)

So stated, these explanations of the constitutional arrangements in force in Britain are overly simplistic and ignore the marked difference in opinion that, not so very long ago, existed within the corridors of power in Whitehall as to the ultimate authority for prosecutorial decision-making in matters involving the internal security of the State. This question, it should be noted, is the other major dimension of the problems associated with defining the demarcation line between the particular ministries which are responsible, respectively, for policing and prosecutions. The simple pronouncement as to the general subject areas within which each of the two ministers has jurisdiction cannot, in itself, resolve the more difficult task of defining the boundary line. This challenging task has now arisen in Nova Scotia with the creation of the new Department of the Solicitor General. It has been part and parcel of England's constitutional law for very much longer and the lessons to be derived from the British resolution of these issues can influence the Canadian situation.

I have endeavoured elsewhere to record the various stages in the English debate as to the ultimate source of authority for making prosecutorial decisions.[4] In this opinion I shall refer only to some of the landmarks in that constitutional debate. In 1925 the Permanent Under-Secretary of State for Home Affairs was expressing the firm opinion that a distinction had to be drawn between the legal aspects of a case and the question of policy that might be involved. As to the former, it was accepted that "...the Home Secretary would almost always regard the opinion of the Law Officers as final." As to the latter, questions of policy, which the Home Office viewed as extending to the determination whether it would best serve the public interest to prosecute or not to prosecute, the permanent head of the Home Office asserted,"it is one which its Home Secretary must either himself decide or, if the matter be of the first importance, bring before the Prime Minister or the Cabinet." Precedents supporting this position show that, prior to and following the First World War, both the Government and notable occupants of the Attorney General's office participated in decisions that effectively transformed the ultimate responsibility for prosecutorial decisions from the Attorney General to the Home Secretary or, beyond him, to the Cabinet of the day.

The famous Campbell affair in 1924 was to focus public and parliamentary attention on "the very delicately adjusted relationship" between the Executive and the Law Officers of the Crown. This included the relationship between the Home Secretary and the Attorney General. It is not known when the Home Office's revised policy of desisting from any interference in the conduct of criminal prosecutions was instituted, though it is highly likely that the

4. See Chapter 8 of my study, "Ministerial Responsibility for National Security" (1980) prepared for the "Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police" [The McDonald Commission]; David C. McDonald, Commissioner.

reverberations of the Campbell affair contributed significantly to the formulation of the new policy. One source of the old policy derived from the wording of the Prosecution of Offences Regulations in 1886 - governing the duties and powers of the Director of Public Prosecutions - but these remnants of the Home Secretary's involvement in prosecution matters had been abandoned in practice long before they were finally repealed in 1946. Although, therefore, up until 1985 the Home Secretary remained as the Minister authorized to appoint every new Director of Public Prosecutions, the correct constitutional definition of the Director's position is that he is subject to the superintendence and control of the Attorney General. I shall have more to say on the exact dimensions of this relationship later in this opinion.

For the present we need only to understand the constitutional principle that derives from the handling of the Campbell affair in 1924 and which remains the bedrock to which every Attorney General and every other Minister of the Crown, including the Home Secretary, is expected to subscribe. As stated by the then Prime Minister, Harold MacMillan, in 1959:

"It is an established principle of government in this country, a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the prosecuting authorities to decide on the merits of the case without political or other pressure. It would be a most dangerous deviation from this sound principle if a prosecution were to be instituted or abandoned as a result of political pressure or popular clamour."
(H.C. Deb. [U.K.] Vol. 600, col. 31, Feb. 16, 1959)

As a corollary it is also recognized as sound constitutional practice that where questions of the public interest are involved it would be foolhardy for the Attorney General to determine the question of prosecuting or not with no regard to the opinions of those colleagues, including the Home Secretary, whose ministerial functions might impinge on the subject matter of the proposed criminal proceedings.

Put in another way, where considerations of the public interest may become embroiled in a case the prosecution process follows three distinctive stages. First, there will be an examination and evaluation of the legal and evidential issues that govern liability. In this exercise both the members of the professional legal staff and the police investigating officers may become involved. Second, in considering the possible repercussions that may impinge on whether or not to pursue the criminal process route, there can be the widest

range of consultations up to and including the ministerial level. Finally, there is the making of the final determination to invoke or not to invoke the criminal law and the criminal courts. In this final stage the Attorney General (or his agent) stands alone in answering the ultimate question. This analysis of the prosecution process is just as applicable to Nova Scotia as it is to England and Wales. Furthermore, there is nothing in the recent reorganization of functions, as between the Attorney General and the Solicitor General of the province, which can be pointed to as altering or in any way disturbing the principles previously discussed in the British context and which are incorporated into my summarized description of how the system should operate in practice.

1.5 The relationship between the Home Secretary and the police in Britain - its bearing on the role of the new Department of the Solicitor General in Nova Scotia

Great stress, as we have seen, has been placed in the House of Commons and in the Quebec legislature on the constitutional model epitomized by the Home Secretary's position vis-à-vis the police in Britain. It is undoubtedly true that for more than 150 years the allocation of ministerial offices within the British Cabinet has never once deviated from the policy of designating the Home Office as the department of State charged with supervising all the police forces in the country. This includes the Metropolitan London Police which has long claimed a special relationship with the Home Secretary. The questions now to be addressed are:

(1) how appropriate is the analogy which was drawn by the Pearson Government in 1966 in support of its decision to transfer to the Solicitor General of Canada "the powers, duties and functions previously exercisable by the Minister of Justice and Attorney General of Canada with respect to the Royal Canadian Mounted Police"?

(2) what are the lessons to be drawn for Nova Scotia in identifying the principles that govern the Home Secretary's interpretation of his role as the "Minister of Police"?

(3) what, if any, differences exist between the role of the Solicitor General of Nova Scotia and that of the Solicitor General of Canada having regard, for example, to the language found in the federal legislation pertaining to the Royal Canadian Mounted Police?

The first two questions approach the same set of issues from slightly different perspectives but for convenience sake will be tackled together. The third question, of necessity, will be directed to the statutory formulation of the federal Solicitor General's

relationship to the RCMP Commissioner. As of now, in looking to the insights to be gained so far as Nova Scotia is concerned, we can do no more than examine the formula adopted in the Order in Council which defines the functions of the new provincial office of Solicitor General. Examining these matters in a comparative setting will make it very clear that serious questions of constitutional importance face the first holder of the Solicitor General's portfolio in Nova Scotia. What must be dispelled is the notion that adherence to the ordinary administration principles that govern the conduct of Ministers of the Crown is all that is expected.

The organization of the police in England and Wales has undergone many changes since the first *Metropolitan Police Act* in 1829, the most notable of which has been the elimination in recent times of the multiplicity of county, city and borough forces and the redistribution of the nation's police manpower into regional units. In all this reorganization the position of the Commissioner of the Metropolitan London Force, the largest police force in the country, and his relationship to the Home Secretary has remained unchanged. Much of the impetus for this essential reorganization stemmed from the Report of the Royal Commission on the Police in 1962 which also examined the relationship of police personnel to both the central authority, in the person of the Home Secretary, and to the local police authorities. I do not intend in this opinion to examine the latter subject though I hope that it will receive attention in one of the Commission's specialist studies on the police system in Nova Scotia.

As to the role of the Home Office, the 1962 Royal Commission rejected the idea that the British police forces should be brought under the direct central control of the Government with effective Parliamentary supervision, preferring instead to recommend various steps that would assign a greater measure of statutory responsibility to the Home Secretary and the Home Office for the efficiency of the police. The Commissioners concluded that:

"It would be inappropriate to assign to the Home Secretary complete responsibility for the police service; it is implicit in our rejection of any arrangement under which the police should be placed under the control of the Government that Ministers cannot in our view be responsible for the acts of individual policemen or for the day-to-day enforcement of the law. Consequently, the responsibility of the Home Secretary should not extend beyond a general duty to ensure that the police operate efficiently and they should have no powers of direction. Thus we recognize a fundamental distinction between central responsibility for an efficient organization, both central and local, and the responsibility

of the police themselves, which is neither central nor local for the enforcement of the law."

Elaborating on this philosophy the Royal Commission reaffirmed the "peculiarly personal nature of the constable's responsibility"- a view that has been repeatedly affirmed by the English courts, the most notable instance being the decision of the Court of Appeal in *Ex parte Blackburn, R.* v. *Commissioner of Metropolitan London Police* [1968] 1 All E.R. 763 at p. 769.

In specifically supporting the retention of the special constitutional status of the police under English law the 1962 Royal Commission declared that in such matters as inquiries with regard to suspected offences, the arrest of persons and the decision to prosecute, what were loosely described as "quasi-judicial" decisions, "it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardized, and public confidence in it shaken, if in this field he were to be made the servant of too local a body". The Commissioners went on to justify the apparent difference in their stance on the nature of police discretion in varying circumstances by pointing to the situation that has always existed in the London Metropolitan Police. There it was explained: "The Commissioner of Police acts under the general authority of the Home Secretary, and he is accountable to the Home Secretary for the way in which he uses his force." An elaboration of this general statement was provided in 1888, in words that are equally applicable at the present time:

"It was quite plain," said the Home Secretary addressing the House of Commons, "that it was the intention of the Legislature to put the police force under the authority of the Secretary of State [for Home Affairs] and to hold him fully responsible, not for every detail of the management of the force, but in regard to the general policy of the police in the discharge of their duty."

The practical effect of this principle is that the policies of the Commissioner of the Metropolitan London Police as regards the disposition of the force, the methods employed in preserving law and order and in law enforcement generally are frequently the subject of questions in the House of Commons to which the Home Secretary replies and, if necessary, he must defend the particular policy or procedures that are under scrutiny. The present position in England and Wales is governed by the *Police Act, 1964*, which in all its essential components reflects the philosophy and specific recommendations of the 1962 Royal Commission.

1.6
The guiding principles that should govern the Solicitor General's approach to his police responsibilities

In answering the questions posed earlier, *viz.*, what are the lessons to be drawn from the British experience and what are the guiding principles that should govern the Solicitor General's approach to his new responsibilities, I may be excused again if I cite the theories that I presented in connection with the McDonald Commission's intensive scrutiny of the RCMP, and which principles that Commission saw fit to adopt in its final report. In my opinion the same principles should obtain at both levels of government and whatever title is used to describe the minister responsible for the police, *i.e.*, whether he is called the Solicitor General, the Home Secretary, the Minister of Police or the Minister of Public Safety. Replying to a question at a press conference on December 9, 1977, the former Prime Minister of Canada, Mr. Trudeau, declared in the most categorical terms his commitment to the principle that the day-to-day operations of a police force should remain outside the ambit of the appropriate Minister's supervisory responsibilities. Mr. Trudeau stated:

"I have attempted to make it quite clear that the policy of this Government, and I believe the previous governments in this country, have been that they...should be kept in ignorance of the day-to-day operations of the police force...I repeat that this is not a view that is held by all democracies but it is our view and it is one we stand by. Therefore, in this particular case it is not a matter of pleading ignorance as an excuse. It is a matter of stating as a principle that the particular minister of the day should not have a right to know what the police are doing constantly in their investigative practice, what they are looking at, and what they are looking for, and the way in which they are doing it."

Inherent in this exposition by Mr. Trudeau is the conviction that the best interests of the State are served in protecting the independence of the police, at all levels and in every jurisdiction, to the maximum degree possible and consistent with the ultimate accountability of the Executive to Parliament or the provincial legislatures for all police activities. This is a sound constitutional doctrine in its most general articulation but I part company from Mr. Trudeau's extreme formulation wherein he was prepared, as a matter of principle, to justify the exclusion from ministerial supervision and knowledge of "what the police are doing constantly in their investigative practices, what they are looking at, what they are looking for, and the way in which they are doing it".

Any contemplation of interference with police decision-making should automatically sound an alarm in the mind of the responsible Minister. So much seems reasonably clear. This, however, is too broad a proposition to advance without qualifications of any sort. In my opinion, undue restraint on the part of the responsible Minister in seeking information as to police methods, practices and procedures can be as much a fault as undue interference in the work of police governing bodies and individual chiefs of police. My approach is contained in the following extracts from the monograph on ministerial responsibility which I prepared for the McDonald Commission and where I wrote:

"The weakness of [the Trudeau] principle as the embodiment of the outer limits of ministerial responsibility for the police is that it treats knowledge and information as to police methods, police practices, even police targets, as necessarily synonymous with improper interference with the day to day operations of a force. This might well be the danger point that is perceived by politicians, chiefs of police and police governing bodies and it would be highly irresponsible to ignore the warning signals... The targets of police investigation and possible apprehensions should normally be left to the judgment of the police acting independently of the government. Any departure from this norm by the Minister, whether it be the Solicitor General of Canada or the Provincial Minister or Solicitor General, would require proof of extraordinary circumstances to justify the action taken. In this kind of situation the tribunal that will sit in judgment is the legislative assembly and the wider public which, if it has the will to insist on the highest constitutional standards of ministerial conduct, can imbue governmental ministers with the right approach to take... It is conceived, on the other hand, that the methods used by a police force in executing its criminal law mandate, "the way in which they are doing it", to borrow Mr. Trudeau's words, should be of continuing concern to the appropriate Minister and that he has not only the right but a duty to be kept sufficiently informed." (*loc. cit.* pp. 96-100)

In the course of police testimony before the McDonald Commission senior members of the RCMP persisted in drawing a firm line between "policy matters" and "operational matters", in support of their view that the responsible Minister, the Solicitor General, should restrict his ministerial functions to questions that fell within the former category only. Operational matters, on the other hand, they maintained, should never concern the political head of the Department of Government responsible for the RCMP. This

dichotomy was firmly rejected by the McDonald Commission in its final report when it declared:

"In our view such a distinction between policy and operations leads to insurmountable difficulties in application, and even worse, it results in whole areas of ministerial responsibility being neglected under the misapprehension that they fall into the category of 'operations' and are thus outside the Minister's purview.... The concept of independence for peace officers in executing their duties has been elevated to a position of paramountcy in defining the role and functions of the RCMP, thus setting the norm for all relationships between the Government and the Force. We believe, on the contrary, that the peace officer duties of the RCMP should qualify, but not dictate, the essential nature of those relationships. The Government must fulfill its democratic mandate by ensuring that in the final analysis it is the Government that is in control of the police and accountable for it. There is no inconsistency in asserting simultaneously that every member of the Government, and above all the Minister responsible for the RCMP, has an essential obligation not normally to become involved in the decisions to be made by members of the force, including the Commissioner himself, with respect to investigation, arrest and prosecution in individual cases."
(Second Report, Vol. 2, pp. 868, 1007-8)

My own sense of where things now stand in Canada in terms of public understanding or that of legislators and Ministers of the Crown as to the distinctions drawn in the above exposition is not one of buoyant confidence. If the underlying principles are sound they must be explained over and over again whenever the opportunity presents itself. I see the eventual report of this Royal Commission as necessitating this kind of adherence to a set of fundamental principles.

1.7
Are there any limits to the Minister's powers of *"direction and control"* over the police?

Some comparisons between the Nova Scotia Order in Council and the *RCMP Act*

At the beginning of this opinion I quoted the pertinent paragraphs from the Nova Scotia Government's Order in Council which defined the scope of the Solicitor General's responsibilities for affairs and matters relating to the police forces in the province. The terms used to describe the Minister's role extend to "the supervision, direction and control" of police matters and it is to the import of this statutory language that I now wish to draw attention. Considerable importance to the implications of the formula "direction and control" was given by the McDonald Commission as part of its analysis of the problems associated with a literal adherence to the terms concerned. As befits that Commission's mandate its analysis concentrates on the language

used in the *RCMP Act*, but I suggest that the underlying issues are very pertinent to the future relationships between the various police forces in Nova Scotia and the provincial Solicitor General.

So, let us begin with the federal *Department of the Solicitor General Act* (R.S.C. 1985, c.S-13) which became law on October 1, 1966. Section 4 of that statute describes the Solicitor General of Canada's ministerial powers in traditional language stating:

"The duties, powers and functions of the Solicitor General of Canada extend to and include all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to...(c) the Royal Canadian Mounted Police."

The above provision, it will be observed, does not proceed to explain or to enunciate what those "duties, powers and functions" precisely mean. Some clarification can be derived from perusal of the *RCMP Act* (R.S.C. 1985, c.R-10), s. 5 of which provides:

"The Governor in Council may appoint an officer to be known as the Commissioner of the Royal Canadian Mounted Police who, under the direction of the Minister, has the control and management of the Force and all matters connected therewith."

There is a long history to this critical section in the *RCMP Act*. It can be traced back to the *North West Mounted Police Act, 1873* which ordained that:

"The Department of Justice shall have the control and management of the police and all matters connected therewith; but the Governor in Council may, at any time, order that the same shall be transferred to any other Department of the Civil Service of Canada."

The same enactment made the Commissioner of the Force:

"subject to the control, orders and authority of such person or persons as may, from time to time, be named by the Governor in Council for that purpose."

By 1959, the relevant sections of the *RCMP Act* had adopted the wording of Section 5 (quoted above) which speaks of the Commissioner having "control and management" of the Force under the direction of the "Minister". The Minister at that time was the Minister of Justice. Now it is the Solicitor General of Canada.

The McDonald Commission, in its approach to defining the respective authority of the Minister and the Commissioner, asked some questions that are incapable of precise answers. For example, do the words "control and management" cover all the activities of the RCMP or are they restricted to administrative matters? If they are intended to be given a restrictive meaning what are the respective roles of the Minister and the Commissioner with respect to those activities which cannot be described as administrative matters? The need for precision in prescribing the powers and authority of the respective officers of the government is amply demonstrated by simply asking the above questions by way of clarification. To ascertain the McDonald Commission's stance on the fundamental issue - are there any limits to the Minister's powers of direction and control over the police - the answer is to be found in the passage quoted earlier from the Commission's final report.

There special attention is devoted to those areas of policing that involve decision-making in individual cases, be it with respect to launching an investigation, the apprehension of a suspect or the ultimate move to lay an information and thereby set the criminal process in motion. These decisions, often described as "quasi-judicial" matters, are rightly seen to be the most sensitive aspects of the police officer's claims to constitutional independence. Speaking with specific reference to the federal police force the McDonald Commission stated its position in these terms:

"We believe that those functions of the RCMP which we have described as 'quasi judicial' should not be subject to the direction of the Minister. To be more explicit, in any particular case, the Minister should have no right of direction with respect to the exercise by the RCMP of the powers of investigation, arrest and prosecution. To that extent, and to that extent only, should the English doctrine expounded in Ex parte Blackburn *be made applicable to the RCMP. Even though the Minister should have no power of direction in particular cases in relation to the exercise by the RCMP of these 'quasi judicial' functions, the Minister should have the right to be, and should insist on being, informed of any operational matter, even one involving an individual case, if it raises an important question of public policy. In such cases he may give guidance to the Commissioner and express to the Commissioner the Government's view of the matter, but he should have no power to give direction to the Commissioner."*
(Final Report, Vol. 2-2, p. 1013)

Under Canadian legislation relating to the police it is impossible to maintain this principle to its utmost length. To do so would be to deny the hierarchical system in which constables are required to obey the lawful directions of their superior officers. Nevertheless, what we see in the conclusions advanced by the McDonald Commission is an amalgam of two inter-related strands of constitutional principle. On the one hand, it is said "The government must fulfill its democratic mandate by ensuring that in the final analysis it is the government that is in control of the police and accountable for it." This maxim obtains whether it is the RCMP or provincial police forces that are involved. It can be said to be exhibited in the terms used by the Nova Scotia Order in Council to describe the responsibilities of the new Solicitor General. It is also reflected in the unbroken line of statutory provisions, dating back to 1873, which define the relationship between the RCMP Commissioner and the federal Minister responsible for the Force.

Consonant with this main strand embodying the doctrine of ministerial responsibility is the other arm of constitutional principle which maintains that there is a commensurate obligation on the part of the Minister concerned (this must include every other member of the Government) to avoid becoming personally involved in the decisions that affect the handling of individual cases. To repeat what I have already stated, this principle of maintaining a strict "hands off" approach extends to the range of police activities that commence with the launching of a criminal investigation through to its completion, the possible arrest of the person(s) suspected of committing a crime, and the final act of instituting criminal proceedings by the laying of an information before a judicial officer.

Constitutionally, it should be universally understood that the strongest presumption exists against the responsible Minister taking any part in these quasi-judicial areas of police discretion, as the handling of particular cases proceeds through its successive stages. Should questions arise as to the methods resorted to by the police in the discharge of these sensitive functions the responsible Minister, the Solicitor General in Nova Scotia, has every right to ensure that a full accounting is forthcoming by the chief of police, whether it is a municipal force or the Royal Canadian Mounted Police. If necessary, corrective action may have to be made under the Minister's direction. In the extreme situation where the Solicitor General reaches the conclusion that the police have erred, and erred to the point that serious questions arise as to the propriety of allowing the criminal proceedings to continue, consultations with the Attorney General would be called for since it is in the hands of the Attorney General that the law has entrusted the power to enter a stay of proceedings.

Since the amendment to s. 579 of the *Criminal Code*, enacted in 1985, "The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct...that the proceedings are stayed by his direction." I have elsewhere, in my comments on the Law Reform Commission's Draft Working Paper on "The Powers of the Attorney General", expressed my views on the consequences that flow from the 1985 amendment and I hope that these can be made available to the Commissioners. In the present opinion I want to reiterate in the strongest terms my conviction that public confidence in the administration of justice requires that the entry of a stay be made a public act in open court with reasons being stated in explanation of the exercise of this enormous power.

I would like to make one final point. By virtue of the interpretation, in Section 2 of the *Criminal Code*, of the term "Attorney General" to include the Solicitor General of the province in which proceedings under the Code are taken, the theoretical possibility exists whereby the Solicitor General is empowered to enter a stay to the same extent as the appropriate Attorney General. That any such eventuality can be contemplated in the face of the assignment to the Solicitor General of supervisory powers over the police may be thought to be so remote as to be dismissed perfunctorily. I have earlier expressed my opinions on the incongruities that derive from using the title Solicitor General without regard to that office's long history. The dilemma to which I have just referred illustrates in telling fashion the trap into which the unwary can stumble and as to which this Royal Commission may wish to declare its views.

January 27, 1988

II
The Office of Director of Public Prosecutions - The English and Welsh Experience

2.1
Introduction

Among the more prominent issues that this Royal Commission will have to consider when drawing up its recommendations is the advisability of creating a statutory office of Director of Public Prosecutions (or some other title). In my opinion, such a move needs to be given a high priority if public confidence in the administration of justice in Nova Scotia is to be restored. I stress the statutory basis for such an office in contradistinction to an administrative appointment in the ordinary public service hierarchy. Examples of the latter are to be found in the position of Director (Criminal) in the Department of Attorney General in Nova Scotia, and that of Director of Public Prosecutions in Newfoundland, New Brunswick and Saskatchewan. Other provinces across Canada have long singled out a senior lawyer in the Crown Law Office as the deputy of the Attorney General responsible for supervising the corps of full time prosecutors.

Whatever title is used to describe this public service appointment it is always understood that the person occupying the office is subject to directions, in general terms or in individual cases, by his immediate superiors on the criminal law side. Thus, in Nova Scotia, no questions would arise as to the authority of the Attorney General and Deputy Attorney General to direct and control the actions of their subordinate, the Director (Criminal) and likewise down the line of hierarchical authority. Short of conferring authority on a Commission of Inquiry to examine the exercise of executive power, it is a rare event for any information to reach the public's attention as to what goes on, day-in day-out, inside a Justice Department.

Involvement of the Minister, who presides over the Department, in the handling of politically sensitive cases is always a potential topic for questioning in the legislature. Just how effective this mode of ministerial accountability happens to be in each jurisdiction will largely depend on the determination of the Opposition and the individual Minister's sense of obligation to give a public explanation as to the reasons for controversial decisions. Few informed observers of the political scene in Canada are likely to express unreserved confidence in the prevailing system, whether it relates to experience in Parliament or in the provincial legislatures. Canada, in this respect, is no different from other developed countries such as the United Kingdom, Australia or New Zealand where the Attorney General also serves as Minister of Justice. It is, I believe, noteworthy that in every one of the constitutions negotiated in the lead up towards independence during the post World War II period, a specific provision will be found that refers to an entrenched office of Director of Public Prosecutions. The degree of independence conferred upon the holder of this office varies from jurisdiction to jurisdiction but

the unifying feature is the removal from the executive branch of authority to determine the D.P.P.'s powers and functions.

Because of the diversity of Commonwealth and United States experience in regard to this office, and the central importance I attach to it in the context of possible reforms that might be recommended by this Royal Commission, I propose to submit a series of opinions on the subject. These memoranda will deal with the following subjects:

(i) the development of the D.P.P.'s Office in England and Wales from its first emergence in 1879, through to the *Prosecution of Offences Act, 1985* and the establishment of a nationwide Crown Prosecution Service;

(ii) the experience in the Commonwealth of Australia and several of its States which in recent years have created their own indigenous D.P.P. models that depart significantly from the English counterpart;

(iii) other approaches that reflect widely differing philosophies as to the role of a Director of Public Prosecutions - the scope of this review will be limited to Scotland, New Zealand, Northern Ireland and those jurisdictions which have chosen to create an office of D.P.P. which is totally independent in the most literal sense of that word;

(iv) the office of Special Prosecutor as it has developed in the United States following the Watergate episode in the late 1970's.

(v) In my final opinion on this subject I will offer my own views as to the kind of statutory office that should be recommended to the Government of Nova Scotia. The goal is to establish a system that will provide solid insurance against a repetition of the events that have tarnished the reputation of the provincial Attorney General's Department.

2.2
Brief review of the Office of Director of Public Prosecutions in England and Wales from 1879 to 1988

Statements as to the respective roles and powers of the Director of Public Prosecutions and the Attorney General at the Present Time

To obtain a proper appreciation of the reforms embodied in the *Prosecution of Offences Act, 1985* it is necessary first to gain a proper understanding of the English system of prosecutions before the changes took effect. Another reason for reverting to the original legislation in 1879 is that it still contains the language that describes the status of the Director of Public Prosecutions and his constitutional relationship to the Attorney General, a subject that is of vital importance in any jurisdiction where these two offices of State exercise interrelated powers and authority.

The *Prosecution of Offences Act, 1879* marked the turning point in the long campaign waged throughout most of the 19th century to establish a more effective and responsible system of prosecutions in England and Wales. What emerged was something far less than an integrated system covering all prosecutions. Prior to 1985, in the vast majority of offences it was the authority of the chief of police that determined whether a criminal prosecution was instituted, continued or terminated. The prosecuting solicitor, usually employed by the local government body, took his instructions from the chief constable. The prosecuting solicitor could advise and recommend but he had no power to prevail over the police point of view. Quite distinct from these local prosecutions were the cases that involved the Director of Public Prosecutions and his staff (solicitors and barristers) and counsel nominated by the Attorney General to conduct the trial on indictment before the Crown Court. This parallel machinery, generally speaking, was concerned with the more serious offences in the criminal calendar.

We in Canada are disposed to view the English office of the Director of Public Prosecutions as the original model, by which all subsequent systems are judged. What has never been fully appreciated is the fact that, until the major reforms instituted in 1985, the scope of the British Director's involvement in the machinery of prosecutions had always been severely circumscribed. The new legislation has substantially changed this state of affairs by creating a network of full time Crown prosecutors under the direct authority of the Director of Public Prosecutions.

The central provision in the 1879 enactment is Section 2. It states:

"It shall be the duty of the Director of Public Prosecutions, under the superintendence of the Attorney General, to institute, undertake, or carry on such criminal proceedings (whether in the Court for Crown Cases Reserved, before sessions of Oyer and Terminer or of the peace, before magistrates, or otherwise), and to give such advice and assistance to chief officers of police, clerks to justices, and other persons, whether officers or not, concerned in any criminal proceeding respecting the conduct of that proceeding, as may be for

the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney General.
The Regulations under this Act shall provide for the Director of Public Prosecutions taking action in cases which appear to be of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, appear to render the action of such Director necessary to secure the due prosecution of an offender, and shall fix the areas or districts for which the assistants of such director shall respectively be appointed and act."

This is the statutory formulation of the constitutional relationship between the Attorney General and the D.P.P. which prevails to this day. It will be noted that the Act speaks of the Director of Public Prosecutions acting "under the superintendence of the Attorney General" with the added possibility of his being "directed in a special case by the Attorney General." Section 8 of the same enactment conferred upon the Attorney General, with the approval of the Lord Chancellor and a Secretary of State, power "from time to time [to] make... rescind, vary, add to, regulations for carrying into effect this Act." It is not necessary to review the ensuing Regulations made in 1880 and 1886 but attention must be directed to the consolidated Prosecution of Offences Regulations which were promulgated in 1946 (S.R. & O. 1946, No. 1467, L. 17), Regulation 5 of which stated:

"The Director of Public Prosecutions shall, in all matters, including the nomination of counsel, be subject to the directions of the Attorney General."

The next major overhaul of the relevant Regulations was conducted in 1978 (S.I. 1978, No. 1357, L. 33) from which the above Regulation 5 was omitted. According to Regulation 2 of the 1978 Regulations the 1946 set of regulations was totally revoked. Not surprisingly there were those who, among the close observers of the political scene in Westminster, perceived this alteration in the law as having subtly and inconspicuously changed the vital relationship between the D.P.P. and his constitutional superior, the Attorney General. Foremost among the critics of this change in the subordinate legislation was Professor J.A.G. Griffith, the then Editor of "Public Law" and a highly respected academic in the University of London. Writing in the columns of "The New Statesman", Professor Griffith assailed what he perceived to be a concerted attempt to formally detach the Director of Public Prosecutions as far as possible from the Attorney General. Professor Griffith concluded, "While

this would have no effect on the closeness of their working relationship it would greatly reduce the responsibility of the Attorney General for the Director of Public Prosecutions' actions: and so remove the Director of Public Prosecutions from public scrutiny. The dangers need no stressing." According to the same writer, the result of the legislative change enacted on January 1, 1979, was to render the Attorney General in law accountable to the House of Commons for a much more limited range of decisions by the Director than he was during the period since 1886. As a corollary, the article concluded "the Director of Public Prosecutions is on many important matters accountable neither to the Attorney General nor to Parliament."

2.3
Sir Michael Havers' authoritative statement in 1979 as to the extent of his continuing responsibilities for the actions of the Director of Public Prosecutions

Professor J.A.G. Griffith's views in matters of public law are entitled to great respect but, in my view, his conclusions on this question were exaggerated. Nevertheless, following the repercussions that flowed from his challenging article, the Attorney General, Sir Michael (now Lord) Havers, delivered the following authoritative statement in the House of Commons as to the extent of his continuing responsibilities for the actions of the Director of Public Prosecutions:

"My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship with him is such that I require to be told in advance of the major, difficult, and, from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction." (H.C. Deb., Vol. 976, Written Answers, Cols. 87-188, Dec. 13, 1979.)

Adverting to the changes incorporated in the *Prosecution of Offences Act, 1979* and the new consolidated regulations of 1978, the Attorney General claimed that the current statutory position involved no departure from the previous law. Havers continued:

"Under Regulations made under the primary legislation" [i.e. the Prosecution of Offences Acts *1879 to 1908] "provision has been made to prescribe the areas in which it is his duty to give advice to*

chief officers of police. The Regulations made to that effect in 1946 provided that the Director was to be in all matters subject to the direction of the Attorney General. That provision was not repeated in the recent Prosecution of Offences Regulations 1979, which replace the 1946 Regulations, because the view was taken that it added nothing to the statutory position set out in the primary legislation and accordingly was unnecessary. Any contention that the subordinate Regulations altered the statutory position referred to above is mistaken because such Regulations would be ultra vires *if they purported to alter the position set out in the Statute itself. The omission, therefore, of the 1946 provision in the current Regulations has in no way affected the statutory relationship between the Director and myself. The Director still carries out his duties under my superintendence and I still have the power to direct in particular cases." (loc. cit.)*

At this point I am going to take the liberty of inserting *verbatim* the comments that I made in my recent book with respect to Sir Michael Havers' careful exposition of his position as the Attorney General. The relevance of my remarks to this Royal Commission's likely concerns with a D.P.P. for Nova Scotia will become readily apparent. I wrote:

"This parliamentary statement was intended to rectify any misconceptions that could be read into the description afforded of his legal status by the present Director of Public Prosecutions, Sir Thomas Hetherington, in his evidence before the Royal Commission on Criminal Procedure. Two aspects of the Attorney General's statement to the House of Commons need to be emphasized. The first is the expectation that the Director regularly bring to the Law Officers' attention those cases which are likely to engender questions as to the correctness of the action taken. Defining the circumstances in which such questions may be raised with any degree of particularity is well nigh impossible. Past experience, the exercise of judgment and a sense of what is likely to arouse public reaction are the ingredients by which the Director is expected to comply with the Attorney General's policy that he be told in advance of the major, difficult, and, from the public interest point of view, the more important decisions concerning the institution of criminal proceedings. There must be consultation in advance of making a decision in such cases. Otherwise the Attorney General is placed in the vulnerable position of having to defend the exercise of discretionary power, without having been apprised beforehand of the facts involved, in such a manner that he can determine himself

whether to approve or reject the Director's advice and recommendations.

Entirely consonant with this policy is the other crucial aspect of the Attorney's more recent elaboration of his responsibilities wherein he described his need to be kept informed 'so that should the need arise I am in a position to exercise my ultimate power of direction.' This affirmation that the source of the ultimate power of direction is vested in the office of the Attorney General remains the fundamental proposition to remember when defining the constitutional status of the Director of Public Prosecutions in England and Wales. The practical caveat 'should the need arise' is of equal relevance, emphasising as it does that the Attorney General's intervention by way of issuing directions to the Director is not envisaged as a normal or regular occurrence. There might not arise a single instance in which the first Law Officer of the Crown and the Director of Public Prosecutions would disagree as to the proper course to take in a particular case. It will be recalled that Hetherington, in his Upjohn lecture, stated that in his experience the Attorney General had never issued a formal direction to him as Director, in the sense of overriding the Director's own formal recommendation. Given the ultimate authority of the Attorney General in such a situation it would be foolhardy on the part of any Director to press his objections to the brink unless he was prepared to simultaneously tender his resignation as the only remaining sanction to achieve his wishes in the matter." ("The Attorney General, Politics and the Public Interest", pp. 49-50.)

Elsewhere in the same text I expressed the view that the connotation of particular words in a statutory enactment, be it an Act of Parliament or a Regulation made thereunder, can become an issue of fundamental importance if the perception of the parties immediately involved diverges according to their status and notions of what the proper relationship between them is or should be. The distinctions may be subtle and, to some minds, of no more than semantic importance. On the other hand, I warned, the change effectuated may contain the seeds of a delayed confrontation. It is not surprising, perhaps, that the Director should emphasize his *de facto* independence. This fact, however, must never be allowed to obscure the realities of the ultimate legal status and authority of the Attorney General and the Director of Public Prosecutions, respectively. Sir Michael Havers' written statement to the House of Commons has not been seriously challenged. Nor can it be, in the light of the statutory provisions which have been reviewed earlier in this opinion. In my view, it is unfortunate that the explicit language of the 1946

Regulation 5 was discarded when the statute law was being revised in 1978-79. Clarity and precision of language is surely preferable when defining such sensitive and fundamental relationships.

2.4
The impact of the *Prosecution of Offences Act, 1985*

According to Section 3(1) of the 1985 statute: "The Director [of Public Prosecutions] shall discharge his functions under this or any other enactment under the superintendence of the Attorney General." Nothing in this provision alters what the Attorney General stated to the House of Commons on December 13, 1979 and which is quoted in full in the preceding section of this opinion. It remains the authoritative exposition as to the exact nature of the constitutional relationship between the two offices. This must be tempered by the century long experience which I have documented in my books on the subject. In particular, I draw your attention to Chapter 2 of "The Attorney General, Politics and the Public Interest" which examines in depth "The modern interpretations of the D.P.P.'s constitutional status." By including in s. 3(1) the injunction that the Director shall discharge his functions "under this or any other enactment" under the superintendence of the Attorney General, the 1985 statute dispels any doubts that may have been entertained as to whether the Director, in exercising his statutory consent powers, was subject to the Attorney General's overriding authority. I am pleased to see that this declaration accords with the view I expressed in my book and which had previously been unclear, at least according to one interpretation of the written evidence submitted to the Royal Commission on Criminal Procedure by Sir Thomas Hetherington, the then Director of Public Prosecutions.

It will be noted that Section 3(1) of the *Prosecution of Offences Act, 1985* uses precisely the same formula as that included in the *Prosecution of Offences Act, 1879*, s. 2, and, more recently, the *Prosecution of Offences Act, 1979*, s. 2, *viz.*, "under the superintendence of the Attorney General", to describe the Director's statutory position vis-à-vis the Attorney General. What the latest enactment in 1985 makes abundantly clear is that it is the Attorney General, not the Home Secretary, who is the Minister of the Crown accountable to Parliament for every action and decision of the D.P.P., and also for the Crown prosecutors who constitute the newly established Crown Prosecution Service. One interesting conundrum that pertains to this definition of the D.P.P.'s relationship to the Attorney General is buried in Schedule 2 of the 1985 Act. Thus, whereas the *Prosecution of Offences Act, 1979* is repealed *in toto*, no similar mention is made as to any repeal of the 1879 enactment.

This apparent oversight is almost certainly not a mistake, especially if we harken back to the statement delivered to the House of Commons by Sir Michael Havers on December 13, 1979. The view taken by successive Attorneys General is that the 1879 statute is still good law and that whatever statements have been inserted in the statutes and regulations thereafter serve only to explain and elaborate the true extent of the "superintendence" criterion. I would expect both the Attorney General and the D.P.P. in England and Wales, if asked, to confirm that the 1985 Act has done nothing to change the correctness of Havers's statement of the constitutional position as expressed in 1979. My comments on the Attorney General's prepared written answer to the Commons, quoted previously, apply equally to the succinct statement contained in Section 3(1) of the present statute.

Earlier in this opinion I described the transformation that has taken place in the respective authority of the chief of police and the prosecuting solicitor with respect to the institution of criminal prosecutions in England and Wales. In its 1981 Report, the British Royal Commission on Criminal Procedure recommended that no alteration be made by way of restricting the common law prerogative of the police, and indeed every private citizen, to decide whether to lay an original information before a Justice of the Peace charging the accused with a criminal offence. This police discretionary power has been left untouched. Thereafter, however, control over the handling of the ensuing proceedings is transferred to the new office of Crown Prosecutor. In other words, responsibility for the *conduct* of a case is to be separated from responsibility for making *the initial decision to proceed*. In anticipation of the occasional serious conflict arising with regard to a decision whether or not to proceed after an information has been laid by the police, the Director of Public Prosecutions in January 1983 requested chief officers of police to consult with him in any case where the police wish to institute or continue criminal proceedings contrary to the advice of the local prosecuting solicitor (see Home Office Circular No. 26 of 1983 and The Attorney General etc. pp. 100-102). I am uncertain as to whether this Home Office Circular properly describes the current position (*i.e.* post 1985).

Writing in July 1988, the present Director of Public Prosecutions (Mr. Allan D. Green, Q.C.) has informed me that the resolution of differences between the police and the Crown Prosecution Service continues to be achieved by informal processes. Although no formal channel of appeal is provided for in the 1985 statute a Chief Constable can, failing satisfaction at the local level, pursue the matter up to the Crown Prosecution Service Headquarters. According to the British D.P.P.:

"We would take the matter up with the local Chief Crown Prosecutor and then we would reply to the police from Headquarters. Ultimately the decision in most cases would be mine, but in a particularly sensitive or important case I might well consult one of the Law Officers, and in an appropriate case I might also seek the advice of counsel (usually Treasury Counsel or a Silk). I should add for the sake of completeness that it would always be open to a Chief Constable or other officer to make a formal complaint about the conduct of a Crown Prosecutor to the prosecutors professional body (i.e. the Bar Council or the Law Society). Perhaps I should also add that if a Chief Constable was particularly aggrieved by a decision of mine, it would no doubt be open to him to raise the matter with the Attorney General, though I am not aware of any occasion where this has occurred."

As for the future, we must turn to the new charter, the *Prosecution of Offences Act, 1985*, for elucidation of the enlarged responsibilities of the Director of Public Prosecutions and the interrelationships that now exist between that office, the Crown Prosecutors and the country's chiefs of police. All the hesitations and foot-dragging of Sir Thomas Hetherington, the former Director of Public Prosecutions, in his evidence before the Royal Commission on Criminal Procedure, have become footnotes to British constitutional history with the making of the D.P.P. as the administrative and executive head of the new Crown Prosecution Service (s. 1(1)(a)). England and Wales have been divided into geographical areas with responsibility for prosecutions conducted within the respective areas being assigned to Chief Crown Prosecutors (s. 1(1)(b) and s. 8). The parallel with the Canadian system of Crown Attorneys and Assistant Crown Attorneys is self apparent. The Chief Crown Prosecutors are responsible to the Director of Public Prosecutions for supervising the operation of the Service in their particular jurisdictions.

However self-evident it might be, it should be pointed out that the Act does not extend to Scotland and Northern Ireland (s. 31(7)). They have their own systems of prosecutions which I describe in "The Attorney General, Politics and the Public Interest", in Chapters 9 and 10. Each jurisdiction has its own machinery and Scotland is undoubtedly enjoying a rare moment of satisfaction as it sees its centuries-old system of procurators fiscal under the Lord Advocate being grafted on to the British prosecution system. It has taken England approximately 150 years to come to terms with the inadequacies of its own indigenous system and to import the philosophy (if not the nomenclature) and experience of their Scottish cousins, north of the border. A careful study of the Northern Ireland

system of prosecutions, and the major changes that were introduced in that Province in fairly recent years, will also be particularly instructive in deciding in which direction Nova Scotia should go. The problems faced in the Six Counties, and the solutions finally adopted, will make familiar reading to everyone who is involved in this Royal Commission.

2.5 Powers of the Crown Prosecutors

The general principle, contained in Section 1 (6) of the *Prosecution of Offences Act, 1985*, is that:

"Every Crown Prosecutor shall have all the powers of the Director as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director."

This includes the giving of consent where, by statute, the D.P.P.'s consent is a necessary pre-condition to the institution or continuation of criminal proceedings (s. 1(7)). When I come to write an opinion on the office of the Attorney General I shall deal with the prerogative power of entering a *nolle prosequi*. In English law it remains the exclusive prerogative of the Attorney General to enter. No change in this regard is evident within the new statute. Related to the Attorney General's powers in this regard, due note must be taken of the D.P.P.'s infinitely broader statutory power to take over a criminal case and, if he sees fit, to terminate the proceedings. These powers of the D.P.P. remain unchanged but it is noteworthy that s. 1(6) confers upon the Crown Prosecutors all the powers of the D.P.P. with respect to "the institution and conduct of proceedings." To avoid any possibility of misunderstanding the interpretation section declares:

"For the purposes of this Part, references to the conduct of any proceedings include references to the proceedings being discontinued and to the taking of any steps (including the bringing of appeals and making of representations in respect of application for bail) which may be taken in relation to them." (s. 15(3))

As a necessary safeguard, in terms of overall direction of the Crown Prosecution Service and executive responsibility for its activities, the statute declares that the powers conferred upon every Crown Prosecutor shall be exercised "under the direction of the Director" (s. 1(6)). If, before the Act, there existed a substantial measure of dispute between the Attorney General and the D.P.P. as to the circumstances in which their respective powers of entering a stay should be exercised, it is not difficult to imagine this problem being compounded with an even larger body of persons having the right to intervene and bring criminal proceedings to a halt.

2.6
Private prosecutions and police prosecutions - the right to institute criminal proceedings

In several of my opinions for the Commission I have made reference to the long established constitutional right, under British law and Canadian law, of any private person to lay an information, if there is a reasonable and probable cause to believe that a criminal offence has been committed. It is this constitutional right which is embodied in the *Criminal Code* and it is the same law that provides the foundation for the oft repeated claim to independence by the police. It entitles a police officer, without seeking the prior permission of any other authority, to proceed before a Justice of the Peace at the conclusion of a criminal investigation and to institute criminal proceedings by means of laying a charge on the same footing as that available to a private citizen.

The importance of this constitutional right, in practical terms, is almost exclusively associated with the police. After all, in the overwhelming majority of cases it is the police who activate the criminal process. We have seen, in connection with the Thornhill affair, the problems that can arise where the chief prosecutor and the chief of police have fundamentally different conceptions of their respective authority in terms of controlling this earliest step in the entire criminal process, *viz.*, that of "laying a charge" or, to use the more customary phraseology, "laying an information". It is important, therefore, to note that the British Parliament, in its *Prosecution of Offences Act, 1985*, has once again reconfirmed this basic right in Section 6(1) which states:

"Subject to Subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director's duty to take over the conduct of proceedings does not apply."

Subsection 2 merely reiterates the existing law in stating:

"Where criminal proceedings are instituted in circumstances in which the Director is not under a duty to take over their conduct, he may nevertheless do so at any stage."

This is an appropriate point to cite the provision in the same enactment which enshrines the new constitutional subordination of the chiefs of police to the Crown Prosecution Service, headed by the Director of Public Prosecutions. According to Section 3(2) of the 1985 statute:

"(2) It shall be the duty of the Director:

(a) to take over the conduct of all criminal proceedings, other than specified proceedings, instituted on behalf of a police force (whether by a member of that force or by any other person);...

(e) to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences."

"Specified proceedings" in paragraph 2(a) above are defined as "proceedings which fall within any category for the time being specified by order made by the Attorney General for the purposes of this section" (s. 3(3)). As with private prosecutions, the Director or any Crown Prosecutor is empowered to stay criminal proceedings instituted on behalf of a police force (*ibid.*, s. 15(3)).

This power on the part of the D.P.P., if he sees fit, to intervene and take over the conduct of a "private prosecution" or a "police prosecution" includes the power to put an end to the prosecution. And as we have already noted from the terms of Section 1(6) the power of discontinuing the proceedings will henceforth be exercisable by individual Crown prosecutors acting "under the direction of" the Director of Public Prosecutions. Effectively, it might be argued, this power of entering a stay of the proceedings empties the right of a private citizen to launch a prosecution of any substantive importance, transforming the constitutional right into nothing more than a symbolic gesture. As recently as 1981 the British Royal Commission on Criminal Procedure concluded:

"Prosecutions by private citizens other than in [shoplifting and common assault] cases are very rare indeed and scarcely seem a sufficient base to justify the position of the great majority of our witnesses who argue in one way or another that the private prosecution is one of the fundamental rights of the citizen in this country and that it is the ultimate safeguard for the citizen against inaction on the part of the authorities." (Report (Cmnd. 8092), p. 160)

The Commission recommended a new system in which private prosecutors would have to apply to the Crown Prosecutor to take up the case and, if the latter refused, be required to obtain the consent of a magistrate's court for the prosecution to proceed (which would then be undertaken at public expense). This recommendation was rejected by the United Kingdom Government in its White Paper "An independent prosecution service for England and Wales", (October 1983, Cmnd. 9074 paras. 11-12). As I have already stated, retention

of the constitutional right to initiate a private prosecution is explicitly recognized in the *Prosecution of Offences Act, 1985*.

It may be apposite at this juncture to observe the attitude towards private prosecutions taken in Canada by the Law Reform Commission of Canada. In its Working Paper No. 52 (1986) on "Private Prosecutions" the conclusion is reached that:

"...it can be safely asserted that today in England (as is the case in Canada) there is an ideological commitment towards retention of private prosecution, subject to an arresting power, vested in the state, either through the Attorney General or Director of Public Prosecutions to intervene and stop the process or take over the prosecution itself." (*ibid.*, p. 51)

After conducting a useful historical and comparative review of private prosecutions the Working Paper recommended:

"(1) The right to prosecute privately ought to be retained and extended to those elements of the trial and appeal process where they are presently proscribed or restricted;...
(3) The right to lay an information and issue process in relation thereto ought to be unexceptional, subject as it presently is to the ordinary law which governs all cases." (*ibid.*, p. 30)

These recommendations are in sharp contrast to the views expressed in an earlier Working Paper (1975, No. 15 at pp. 49-50). The change of mind is appropriately acknowledged in the latest Law Reform Commission of Canada publication.

It may be thought that I have unduly concerned myself in this opinion, and other opinions prepared to assist the Commission, with the "constitutional right" of a private citizen to launch the criminal process. What this Royal Commission is concerned with, after all, is the legal position of a police officer to lay an information in the face of unambiguous instructions by the Deputy Attorney General that, whatever the strict interpretation of the law may be, the police must obey the orders of their "political masters." I use this phrase to encompass the Minister and the officials in the Attorney General's Department.

When speaking of the constitutional right of the *police* to lay an information I am referring to the common law origins of the ordinary *citizen's* right to institute criminal proceedings. The police do not derive their authority from the Crown or from the Minister who is the member of the Executive Council responsible for administering the particular *Police Act*. However broadly the functions of the police

may be described in provincial or federal police legislation, I am not aware of any provision (apart from the *Criminal Code*) which specifically confers the right to lay charges in a police officer. The Code, as I have described in another opinion, uses the key phrase "Anyone..." in Section 504. The number of occasions in which this power is invoked by the ordinary citizen may be infinitesimal, whether we are looking at the situation in Britain or in Canada. This probably explains the disposition of the Law Reform Commission of Canada in 1975 to envisage a severe curtailment of the right, an attitude that was replicated by the British Royal Commission on Criminal Procedure in 1981. In essentially practical terms it may well be true that any such move might not give rise to large scale denunciations by the general public. It is, however, to the broader repercussions of any such move, as it affects the police, that I keep referring in these opinions. All the more reason, therefore, to welcome the reaffirmation of the right to institute private prosecutions in the British enactment of 1985 and the revised stand reflected in the latest study on the subject by the Law Reform Commission of Canada.

February 19, 1988

III
The Office of Director of Public Prosecutions - The Australian Experience

3.1
Attorney General Donahoe's statement in the Nova Scotia Legislative Assembly on March 3, 1988

In my previous opinion, I traced the development of the D.P.P.'s office in England and Wales from its inception in 1879 through to the latest British legislation, the *Prosecution of Offences Act, 1985*, which brought into being a nation-wide Crown Prosecution Service. Much of that initial opinion was concerned with defining the respective functions and powers of the D.P.P. in relation to the office of the Attorney General. As well, I sought to place the inter-relationship between these state officials within the pervasive doctrine of accountability to the legislature.

Since I submitted that opinion my attention has been drawn to the debate in the Nova Scotia Legislative Assembly on March 3, 1988 in the course of which then Attorney General, Mr. Terence Donahoe, intimated that he and his departmental officials are actively examining the possibility of establishing "an independent prosecutorial arrangement for a certain class or classes of people". According to the Attorney General, "I happen to be one who believes that it is incumbent upon us to address and search out a legislative framework and an institutional framework in which and through which we would have an independent prosecutorial process" (Hansard, March 3, 1988, p. 371). If I am to read anything specific from Mr. Donahoe's remarks it suggests that the Attorney General's Department has been studying the United States legislation (the *Ethics in Government Act*, enacted in 1978 in the aftermath of Watergate) which provides for the appointment of a "special prosecutor" (subsequently renamed "independent counsel") in cases where senior members of the federal administration, members of the U.S. Congress, etc., become the subject of a criminal investigation.[5]

In my view, the problems associated with the Nova Scotia Attorney General's Department are much deeper and more fundamental than those addressed by the United States precedent of a special prosecutor. It would be most unwise to be diverted from the Commission's own research priorities because of this revelation as to the thinking that is going on in the present Attorney General's mind, however encouraging this may be in its recognition of the need for significant changes in the provincial system of prosecutions.

In this opinion I propose to review the significant developments that have taken place in the last few years (1982 - 1986) in Australia, where different answers have become evident in the legislative solutions adopted by the Commonwealth and State Parliaments to the crucial questions of independence, control and accountability as these relate to the office of Director of Public Prosecutions.

5. As I indicated earlier, I intend to devote a separate opinion to the United States experience, bearing in mind the latest challenge that is presently before the U.S. Supreme Court to the constitutionality of the Congressional legislation. That opinion will follow immediately upon the completion of the present analysis of the Australian experience in creating "an independent prosecutorial process".

3.2
The State of Victoria (1982) and the Commonwealth of Australia (1984) lead the way but take different approaches to solving some of the critical issues surrounding an independent Director of Public Prosecutions

There is not the time in this memorandum to chronicle in any depth the events that, in the space of only a few years, generated the unprecedented spate of Australian enactments in the area of criminal prosecutions. Were it possible to do so, the similarities in the loss of public confidence that Australia and Nova Scotia have shared in recent times would quickly become apparent. From the earliest indications (in the 1970's) of possible involvement by the Federal Crown Solicitor's Office in Western Australia in a highly organized system of tax evasion, to the series of scandals involving political figures and members of the judiciary in the activities of organized crime, Australia has been subjected in the past ten years to the embarrassing findings of one Royal Commission after another. Public confidence in the normal machinery of justice was shaken to the point that Special Prosecutors were appointed, with total independence from the Attorney General, under new legislation providing for such extraordinary appointments. The transition from *ad hoc* Special Prosecutors to a permanent statutory office of the Director of Public Prosecutions was foreseen and strongly advocated by each of the Special Prosecutors appointed by the Commonwealth Government.

Almost simultaneously the State of Victoria moved to establish a Director of Public Prosecutions, and this was effectuated by statute in 1982. Entitled the *Director of Public Prosecutions Act* (No. 9848 of 1982) its principal provisions, for our present purpose, are as follows:

s.3
(1) The Governor in Council may appoint a qualified person to be the Director of Public Prosecutions.
(2) A person is qualified to be appointed Director if he is a barrister and solicitor of the Supreme Court of not less than eight years' standing.
(3) A person who has attained the age of 65 years shall not be capable of being appointed or re-appointed as Director.

s.4
(1) Subject to this Act, the Director shall hold office until he attains the age of 65 years.
(2) The Director shall be entitled to be paid such salary and allowance as are for the time being payable to a puisne Judge of the Supreme Court pursuant to Section 82(2) of the Constitution Act, 1975.
(3) The Director is not, in respect of his office as Director, subject to the Public Service Act, 1974.

s.5

(1) The Director may resign his office by writing signed by him and delivered to the Governor in Council.

(2) The Governor in Council may suspend the Director from office and subject to this section may remove the Director from office.

(3) The Attorney-General shall cause to be laid before each House of Parliament a full statement of the grounds of suspension of the Director within seven sitting days after the suspension if that House is then sitting or, if that House is not then sitting, within seven sitting days after the next meeting of that House.

(4) The Director shall be removed from office by the Governor in Council if each House of Parliament within seven sitting days after the day when the statement is laid before it, declares by resolution that the Director ought to be removed from office and, unless each House within that period so declares, the Governor in Council shall remove the suspension and restore the Director to office.

(5) The Director shall not engage in the practice of his profession or in any other employment except in the exercise of the functions of his office."

These provisions indicate at once the special status accorded the new office of D.P.P. in the State of Victoria. In a paper prepared for the conference on Reform of the Criminal Law held in the Inns of Court, London in July 1987 the current holder of the office, Mr. John Coldrey, Q.C., observed:

"The creation of independence, both in fact and in appearance, has been achieved by according the Director of Public Prosecutions the status of a Supreme Court Judge. Apart from the inviolability of tenure a further advantage accruing from this situation is that any subsequent appointment of a Director as a Judge of the Supreme Court of Victoria involves a lateral transfer of duties and interests thus effectively nullifying any temptation to use the position of Director as a stepping stone in a career dependent for advancement upon future Government approval. A tangential benefit of investing the Office with judicial prestige is that the decisions of a Director are more readily accepted by the community. Autonomy is reinforced by the requirement that the Director produce an Annual Report for tabling in Parliament. The availability of this mechanism for enabling the operation of the Office to be detailed provides an effective deterrent to any inappropriate lobbying (political or otherwise) on behalf of complainants, accused persons or other interest groups."

Confirmation of the underlying policy to make the D.P.P. as independent as possible in the execution of his statutory responsibilities is contained in Section 9 of the Victoria statute. It states:

s.9

(1) The functions of the Director are:

(a) to prepare institute and conduct on behalf of the Crown, criminal proceedings in the High Court, Supreme Court and County Court;

(b) where he considers it desirable to do so--

(i) to prepare institute and conduct any preliminary examinations under Part V of the Magistrates (Summary Proceedings) Act, 1975;

(ii) to take over and conduct any proceedings in respect of a summary offence or an indictable offence tried or being tried summarily; and

(iii) on behalf of the Crown, to assist a coroner or to instruct counsel assisting a coroner in any inquest under the Coroners Act 1958; *and*

(c) to carry out such other functions as may be given to him by or under this Act or any other Act.

(2) The Director shall be responsible to the Attorney-General for the due performance of his functions under this Act or any other Act.

(3) Nothing in Subsection (2) shall affect or derogate from the authority of the Director in respect of the preparation, institution and conduct of proceedings under this Act or any other Act.

(4) In any proceedings instituted or conducted by the Director or any proceedings by way of appeal from or otherwise arising out of proceedings instituted, or conducted by the Director, the Director may appear in person or may be represented by counsel or a solicitor."

In an interview published in 1984 (see Vol. 58 of the Victoria Law Institute Journal, p. 777 *et seq.*) the first occupant of the new office (Mr. John H. Phillips, Q.C.) declared: "I doubt that the English D.P.P.'s office has been reflected in my office at all. I've no doubt my English counterpart is an independent officer, but his formal arrangements don't support an independent status. He's answerable by regulation to the Attorney General in all matters, even in the selection of counsel, and in addition he only handles about five to ten percent of the serious criminal work." This assessment of the English D.P.P.'s relationship to the Attorney General was generally correct at the time it was made, but account must now be taken of the transformation in the scope of the English D.P.P.'s involvement, in

serious and non-serious criminal cases, since the enactment of the 1985 legislation.

I draw your attention particularly to the language of Section 9(2) of the Victoria statute. Time will tell whether the assumed independence claimed by the State's D.P.P. is reconcilable with the terms of the subsection declaring the Director to be "*responsible to* the Attorney General for the due performance of his functions under this Act or any other Act." The choice of language in s. 9(3) is also open to different interpretations, referring as it does to "the *authority* of the Director in respect of the preparation, institution and conduct of proceedings" not being affected or derogated by the terms of s. 9(2). In my final opinion, where I intend to assess the merits of the different approaches to defining the role of the D.P.P., I shall examine more closely the important concepts of "accountability", "superintendence", "control" and "direction". To these we should now add the principle embodied in the language of "responsibility" to the Attorney General for the due performance of his [the D.P.P.'s] functions.

Since I first drafted this memorandum I have been able to study the corresponding D.P.P. statute in the State of Queensland (No. 95 of 1984). To all intents and purposes it replicates the exact provisions contained in the 1982 enactment in the State of Victoria. The latest State to establish a statutory Director of Public Prosecutions is New South Wales (Act No. 207 of 1986).

3.3
The termination of criminal proceedings in individual cases - further differences in the Victoria and Commonwealth positions

In one important respect, *viz.*, the discontinuance of criminal proceedings once these have been launched, the prerogative power of the Attorney General of Victoria has been expressly retained, though concurrently with the exercise of a like power conferred upon the Director of Public Prosecutions. The relevant Section 14 provides as follows:

s.14

(1) On and from the commencement of this section, the Director shall have the same power to enter a nolle prosequi *in criminal proceedings as the Attorney General had immediately before the commencement of this section.*

(2) Nothing in Subsection (1) shall affect the power of the Attorney-General to enter a nolle prosequi *in criminal proceedings."*

In other words, the Victoria legislation bestows upon the State's Director of Public Prosecutions exactly the same power to discontinue a prosecution as that exercisable by the Attorney General. The latter's historic authority is left undiminished in theory.

In practice, the D.P.P. can be expected to make most of the day-to-day decisions. This arrangement, however, has not received approbation in the Commonwealth field. Its statute, by circuitous language, gives restricted authority to the federal D.P.P. to stay criminal proceedings. Thus, whilst Section 9(4) of the Australian statute entitles the D.P.P. to "decline to proceed further" where

"(a) a person is under commitment, or has been indicted, on a charge of an indictable offence against a law of the Commonwealth, and

(b) the prosecution ... was instituted, ... taken over or is being carried on by the Director,"

there is an insurmountable barrier to the exercise of such a power in the preceding subsection (*i.e.*, s. 9(3)). That provision precludes the D.P.P. from taking over a prosecution on indictment which has been instituted by the Attorney General or a Special Prosecutor. In preparing this Royal Commission's final recommendations careful attention will have to be paid to the merits of the respective approaches followed in Australia and also with respect to the clarity of the language chosen to express the legislature's governing policy in this vital area of prosecutorial discretion.

The views of the two Directors of Public Prosecutions, who have held that office in the State of Victoria since its inception in 1982, on the subject of staying criminal proceedings are worth recording in this comparative opinion. According to the first holder of the office, Mr. John Phillips, Q.C., speaking in the course of the interview referred to earlier:

"some people still write to the Attorney General seeking [a] nolle prosequi *because, of course, he retains the power to enter it. He writes to me seeking my advice in those cases and when I've made a decision I communicate to him; but I have absolutely no contact with him whatsoever as to the actual decision to prosecute or not to prosecute... One of the most pleasant parts of my job is that there hasn't been the faintest hint of political pressure or interference, and I'm talking about all the political parties when I say that."* (*ibid.*, p. 779)

The present D.P.P. in the State of Victoria has expressed significantly more critical opinions with respect to the parallel powers vested in both the D.P.P. and the Attorney General to stay a prosecution. In his paper to the 1987 Reform of the Criminal Law Conference held in London, John Coldrey described the relevant provision in the

Victoria enactment as "a further strand of accountability to the Parliamentary process". He continued:

"Although as a matter of practice the Attorney General declines to act as 'a Court of Appeal' from a decision of the D.P.P. refusing to terminate a prosecution, the mechanism for such intervention remains. Whilst at first blush the retention of this power may appear desirable, its exercise, adverse to the decision of the D.P.P., has the potential for undermining public confidence in the capacities of that law officer. If it be thought that such an assertion exhibits hypersensitivity, it should be coupled with advertence to the dangers the situation poses for an Attorney General. A decision not to prosecute after a directive from the D.P.P. that a prosecution should proceed would leave an Attorney General open to a charge of political interference and allegations of a cover-up. One would certainly make a case that this power should not be shared and that any challenge by an accused to a decision to prosecute is best mounted in the courts by seeking to establish an abuse of process." (loc. cit.)

Much of the force of this line of argument and its conclusion is diminished by Mr. Coldrey's subsequent acknowledgement that "The Victoria Courts have eschewed the conduct of any examination of the executive decision-making process involved in the entry of *nolle prosequi*. Any reversal of this stand would be fraught with problems" (*op. cit.*, p. 9). We hardly need reminding that these observations cannot be transposed to the Canadian scene without paying proper regard to the impact that the Charter of Rights and Freedoms has made in the sphere of judicial reviewability of actions by members of the Executive, and this includes the Attorney General.

3.4 The underlying philosophy of the Commonwealth of Australia's *Director of Public Prosecutions Act* of 1984 - the views of the Attorney General and Shadow Attorney General

To gain an understanding of the reasons that lay behind the introduction of the Australian federal legislation in 1983 it is necessary to refer to the notably brief speeches of the Commonwealth Attorney General (Senator Gareth Evans) and his predecessor (Senator Peter Durack) during the Second Reading of the Bill. According to the Attorney General:

"The Bill now before the Senate represents an important and historic development in the law and practice governing the prosecution of offences against Commonwealth law. The Bill establishes an Office of the Director of Public Prosecutions with the main functions of conducting Commonwealth prosecutions and exercising discretion in relation to prosecutions. Similar offices of

Director of Public Prosecutions have existed in the United Kingdom since 1879 and in the State of Victoria since 1982. The experience of recent years, particularly the revelations of unacceptable delay and other deficiencies in the administration of the Commonwealth criminal law contained in the reports of Royal Commissions conducted by Mr. F.X. Costigan Q.C. and Mr. Justice Stewart, has made clear the need to revitalize and reorganize Commonwealth prosecution processes.

The establishment of an Office of Director of Public Prosecutions, which was foreshadowed in the Government's pre-election statement on law and justice, is an important step in this regard. It will interlock with the setting up of the National Crime Authority under the National Crime Authority Bill which I have also introduced today. Moreover it is a step recommended by Mr. Justice Stewart and Special Prosecutor Redlich. The establishment of the office will proceed concurrently with the review of the Attorney General's Department which is well advanced.

The circumstances relating to Commonwealth prosecutions are significantly different from those relating to United Kingdom and Victoria prosecutions and consequently the Commonwealth legislation will necessarily differ from the legislation enacted in those jurisdictions." (Senate Hansard, 10 November, 1983, p. 2496)

Speaking in support of the Bill, which incidentally passed through the remaining stages without amendment or debate, Senator Durack, the former Attorney General of Australia, noted that the measure involved "the establishment of an independent Office of Director of Public Prosecutions." He went on:

"I believe that a move in this direction was made at about this time last year with the creation of the Special Prosecutor. It was seen as desirable that an office of independent prosecutor should be created to deal with cases where criticism or concern was expressed about the role of the Attorney General's Department or the Crown Solicitor's Division in cases of great complexity such as the "bottom of the harbour" schemes. The Special Prosecutors Act *and the appointment of two special prosecutors which were made under it last year in the wake of the report of the Costigan Royal Commission on the Activities of the Federated Ship Painters and Dockers Union clearly established the need for an independent prosecuting arm for the Attorney General. I am pleased to note that this legislation recognizes that fact. It does not seek to remove or repeal the previous legislation. Indeed I think there will be very full*

justification for its use in the future as well as in regard to the two cases which led to special prosecutors being appointed under the legislation of a year ago.

The same thinking behind the establishment of the special prosecutors has led to the further step of having the general prosecutions of Commonwealth related crime in the hands of a specialist, a person who is independent and seen to be independent of the Attorney General and of any political influence. As I have said, there are the considerations of that kind as well as the considerations of achieving more efficient and expert prosecutions at the Commonwealth level to which the creation of the Office of the Director of Public Prosecutions will give rise, and which the Opposition fully supports." (*op. cit.*, November 6, 1983, pp. 2671-2672)

In the light of the statement made by the Attorney General of Nova Scotia in the provincial legislature on March 3, 1988, indicating a marked interest in the creation of an office of Special Prosecutor analogous to that in the United States, the remarks of Senator Durack quoted above take on a special significance. It is also worth remembering how, in the Commonwealth of Australia, the expedient of establishing a Special Prosecutor to handle exceptionally sensitive prosecutions naturally led to the acceptance of an independent director in charge of all prosecutions. Legislation providing for both situations now exists side by side, though the circumstances necessitating resort to the appointment of a Special Prosecutor may be few and far between.

Reverting to the debate in the Australian House of Representatives on the Bill to establish a Commonwealth Director of Public Prosecutions, both the incumbent Attorney General and his predecessor, speaking from the Opposition benches, were agreed on the issue of accountability. Before examining the exact terms of the Commonwealth legislation it will be well also to place on record the views expressed in the Australian Parliament on this crucial issue. Speaking in support of Clause 8 of the Bill (quoted in full below - the Hansard text refers to Clause 11 but this is incorrect) the Attorney General declared:

*"The Attorney General, as First Law Officer, has always borne the ultimate responsibility for prosecution decisions and the legislation enacted in England did not alter this position. This, in my view, is as it should be and, by Clause 11 [*sic*] of the present Bill, the Director, in the performance of his functions, is made subject to directions and guidelines by the Attorney General. These must, however, be*

published. Day to day prosecution decisions will ordinarily be made by the Director or his officials. It will indeed be very unusual for the Attorney General to give a direction in a particular case. The possibility must, however, be provided for so that the Attorney General may discharge his ultimate responsibility to Parliament and to the people for the conduct of the prosecution process." (*op. cit.*, 10 November, 1983, p. 2497)

Concurring with the Attorney General's firm stand on this question, the 'Shadow' Attorney General made some general comparisons with what, he understood, were the principles adopted in other parts of Australia. We need not concern ourselves at this point with the correctness or otherwise of Senator Durack's analysis. His own thinking is clearly evident in this passage from his Second Reading speech:

"The question does arise as to the accountability of such an office. Under Victoria legislation, as I understand it, the Director of Public Prosecutions there has been granted complete independence and is not subject to direction from the Attorney General. I understand that the situation is the same in regard to the Crown Advocate in Tasmania. However, that has never been the case with the Director of Public Prosecutions in England. He has always been subject to directions of the Attorney General. I think it is appropriate that the Australian Attorney General as a member of the Government and of the Parliament should retain ultimate responsibility for the administration and enforcement of the criminal law of the Commonwealth.

This Bill preserves that very high function of the Attorney General. It enables him to conduct prosecutions in his own right, although, obviously, that would be done only in very rare cases, because he would have this major, prestigious and expert Office of the Director of Public Prosecutions to carry on the work of prosecutions for the Commonwealth in the great majority of cases. However, that political responsibility remains with the Attorney General and directions can also be given by the Attorney General to the Director of Public Prosecutions. As is appropriate any directions will have to be made known by being tabled in Parliament. However, there is some qualification in that if such directions might prejudice a trial, they would not be tabled until the trial had concluded.

Another important aspect, although it may not be so obviously understood, is that the legislation does enable the Director of Public Prosecutions, and ultimately the Attorney General by direction to

the Director of Public Prosecutions, to take over any prosecutions which have been commenced and to conduct committal proceedings or to take over the conduct of committal proceedings which have already been commenced. There has been some doubt as to the powers of the Attorney General under the present law in that regard. I believe it is most desirable that that matter should be clarified. It is certainly desirable that in any prosecution for an offence against the Commonwealth laws, whether it be at the committal stage, in summary proceedings or on indictment, there should be this overall control by the most senior prosecuting official of the Commonwealth to take over and conduct such proceedings or to cease the prosecutions." (Senate Hansard, 16 November 1983, p. 2672)

As we shall see in reviewing the Commonwealth enactment there are striking disparities between the federal and state philosophies on the question of independence and accountability.

3.5
The marked divergence in the Federal and State approaches towards the questions of the Director of Public Prosecution's independence and the Attorney General's accountability

A careful study of the relevant sections in the Commonwealth of Australia statute demonstrates the obvious intention to reject, so far as Commonwealth prosecutions are concerned, the Victoria model of an independent Director of Public Prosecutions. Here are the significant provisions in the federal Act that deal with this fundamental question:

s.7 Consultation
(1) The Director shall, if requested to do so by the Attorney General, consult with the Attorney General with respect to matters concerning the performance of the Director's functions or the exercise of the Director's powers.

(2) The Attorney General shall, if requested to do so by the Director, consult with the Director with respect to matters concerning the performance of the Director's functions or the exercise of the Director's powers.

s.8 Directions and Guidelines by Attorney General
(1) In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.

(2) Without limiting the generality of Subsection (1), directions or guidelines under that subsection may:
(a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences;
(b) relate to the circumstances in which undertakings should be given under Subsection 9(6); and
(c) be given or furnished in relation to particular cases.

(3) Where the Attorney General gives a direction or furnishes a guideline under Subsection (1), he shall:
(a) as soon as practicable after the time that is the relevant time in relation to the instrument containing the direction or guideline, cause a copy of the instrument to be published in the Gazette; and
(b) cause a copy of that instrument to be laid before each House of the Parliament within 15 sitting days of that House after that time.

(4) Subject to Subsection (5), the relevant time for the purposes of Subsection (3), in relation to an instrument under Subsection (1), is the time when the instrument is made.

(5) Where :
(a) an instrument under Subsection (1) relates to a matter in relation to which proceedings may be instituted or are being carried on; and
(b) the Attorney General is satisfied that the interests of justice require that the contents of the instrument not be disclosed, the relevant time for the purposes of Subsection (3) in relation to the instrument is whichever is the earlier of the following times:
(c) the time when the Attorney General ceases to be satisfied as to the matter mentioned in paragraph (b); or
(d) the time when :
(i) it is decided that no proceedings will be instituted in relation to the matter; or
(ii) all proceedings in relation to the matter (including proceedings by way of appeal from, or otherwise arising out of, proceedings in relation to the matter) are determined or discontinued, as the case may be."

The express inclusion of a section imposing a corresponding duty upon both the Attorney General and the Director of Public Prosecutions to consult with the other official, when requested to do so by his colleague, is unique and has no parallel in similar legislation with which I am acquainted. It underlines an essential element in any workable relationship between the Attorney General and the Director, whatever other statutory provisions might have to

say as to their respective powers.

The most notable provision in the Commonwealth statute is Section 8 which resorts to clear language in stating that "In the performance of the Director's functions and in the exercise of the Director's powers" - there are, it will be noted, no limitations and no conditions - "the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director by instrument in writing." Opportunity is provided for the Director to express his reactions to any proposed direction before the Attorney General's views are finalized and committed to written form. When the exchange of ideas has run its course the direction of the Attorney General always prevails.

By having to reduce these directives to a written instrument and, subject to the sensible provisions relating to prejudice and consequent delay in publication, in ensuring that the Attorney General's directives are made public by means of the official *Gazette* and tabling the document before each House of Parliament, the Australian legislation reflects a strong commitment to the principle of public accountability. This will become especially important if the Attorney General's instructions pertain to the handling of a particular case. As will be noted, this discretion is expressly confirmed by Section 8(2)(c) and reflects a policy position diametrically opposed to that contained in the State of Victoria legislation. The same approach is to be found in Section 11(1) of the same Act which confers upon the Australian D.P.P. power, by instrument in writing, to issue directives or guidelines to (a) the Commissioner of Police of the Australian Federal Police, (b) the Crown Solicitor or a Deputy Crown Solicitor (roughly equivalent to the existing Crown Agent in Alberta and Crown Attorney in other provinces), and (c) any other person who conducts investigations or institutes or carries on federal prosecutions. The significant provision is that contained in Section 11(2) which empowers the D.P.P., if necessary , to give directives to any of the persons listed above *in relation to particular cases*. Also of interest is the requirement that the Director provide the Attorney General with a copy of each directive given or guideline furnished under Subsection 1 but this does not extend to Subsection (2).

There may be some voices raised in objection to the principle contained in Section 8(5) which enables the Attorney General to postpone the release of his directive to the D.P.P. where he [the A.G.] "is satisfied that the interests of justice require that the contents of the instrument not be disclosed". This delay may be dictated by a concern not to prejudice the accused in the instant case or in related proceedings. Other possibly prejudicial circumstances can be envisaged.[6]

6. In my book "The Attorney General, Politics and the Public Interest", pp. 429-431, I have elaborated on the reasons for exercising restraint in providing public explanations, especially where the decision is not to institute proceedings. These considerations, I suggest, are equally germane to the Australian provision presently being discussed.

To gain a true appreciation of the marked divergence between the federal and state approaches to the involvement of the Attorney General and the D.P.P. in the handling of an individual prosecution it may be helpful at this juncture to quote the relevant extracts from the Victorian D.P.P. statute of 1982. Thus, according to Section 9 of the latter enactment:

"(2) The Director shall be responsible to the Attorney General for the due performance of his functions under this Act or any other Act.

(3) Nothing in Subsection (2) shall affect or derogate from the authority of the Director in respect of the preparation, institution and conduct of proceedings under this Act or any other Act."

On the subject of issuing instructions or guidelines, in conformity with the exclusive authority conferred upon the D.P.P. by Section 9(3) above, the Victoria legislation would appear to preclude any possibility of the Attorney General ever issuing specific instructions with respect to "the preparation, institution or conduct" of criminal proceedings. As we have already noted, however, the Attorney General's traditional powers of entering a *nolle prosequi* are preserved. With respect to the Director of Public Prosecutions, his powers are enumerated in Sections 10 and 11 of the Victorian statute which state:

s.10
(1) The Director may from time to time furnish guidelines to -
(a) prosecutors for the Queen and other persons acting as prosecutors for the Crown;
(b) members of the police force; and
(c) any other person or persons with respect to the prosecution of offences but the Director is not entitled to furnish guidelines in relation to a particular case .

(2) Where the Director furnishes any guidelines to any person under Subsection (1), the Director shall cause a copy of the guidelines to be published in the Government Gazette.

(3) Nothing in Subsection (1) or in any guidelines thereunder shall prevent the exercise or performance by a Prosecutor for the Queen of any power or function given to him by the Crimes Act, *1958.*

11.

The Director may from time to time give directions to members of the police force and other persons with respect to the offences and classes of offences which are to be referred to the Director for the institution and conduct of proceedings."

It is in the above Section 10 of the Victoria statute that we note the most significant divergence between the State and Commonwealth approaches to the questions of independence and accountability. Both levels of government embrace the principle of requiring publication in the official *Gazette* of any prosecutorial guidelines, thus ensuring that both legislators and the general public will be in a position to evaluate the grounds on which the enormous powers of prosecutorial discretion are exercised in the name of the State. Whereas, however, in the case of the D.P.P. in Victoria he is expressly prohibited from furnishing guidelines (more appropriately described as directives) "in relation to a particular case" either to the prosecutors in the field or to the police, the Commonwealth of Australia imposes no such prohibition on its Director of Public Prosecutions. Neither does the Commonwealth legislation, as we have seen, impose an absolute veto on the Attorney General's intrusion into the disposition of individual cases, but it does ensure that the consequences of any such involvement be measured with great deliberation by imposing a mandatory requirement of publication in the official *Gazette* of the Attorney General's written directives and prompt notification to Parliament of every such action.

3.6 Directives by the Commonwealth Attorney General to a Special Prosecutor

Although I propose to devote a separate opinion to the subject of special prosecutors, with particular reference to the United States experience, I believe it is appropriate that I include in this memorandum a closer look at the way in which the Commonwealth of Australia has dealt with the powers and authority of its Attorney General in relation to the office of Special Prosecutor within the federal jurisdiction.

Up to now, I have only alluded indirectly to the Commonwealth legislation setting up machinery for the appointment of one or more Special Prosecutors. Basically the functions of a Special Prosecutor correspond to those already discussed with reference to the Director of Public Prosecutions. The former appointment is designed to meet exceptional situations. The latter, on the other hand, is ongoing and has permanent status in the justice system. I wish to direct your attention especially to Section 7 of the Commonwealth's *Special Prosecutors Act* (No. 79 of 1982) which states:

s.7 Directions and guidelines to Special Prosecutor
(1) The Attorney General may, by notice in writing, give directions or furnish guidelines to a Special Prosecutor with respect to the performance of the functions of that Special Prosecutor but the Attorney General is not entitled to give directions or furnish guidelines in relation to a particular case.

(2) Where the Attorney General gives any directions or furnishes any guidelines to a Special Prosecutor under Subsection (1), the Attorney General shall cause a copy of the directions or guidelines to be published in the Gazette."

It will be observed that, unlike the policy incorporated into the *Director of Public Prosecutions Act* enabling the Attorney General, if necessary, to issue directives to the Director in relation to a particular case, Section 7 of the *Special Prosecutors Act* prohibits the exercise of a similar discretion with respect to the Special Prosecutor. If conjecture is permitted as to the reasons behind this apparent inconsistency I suggest that the very creation by the Attorney General of a Special Prosecutor denotes the need to manifest a hands-off policy and this would not be accomplished if the Attorney General were seen in fact to be involving himself in the handling of the particular case that led to the Special Prosecutor's original appointment. There is a fine line between the general directives envisaged in Section 7(1) and the particular directives prohibited in the same provision. Experience will demonstrate how successfully holders of the office of Attorney General steer the required course, having regard to whether it is the Special Prosecutor or the Director of Public Prosecutions who is seized of the prosecution.

Reading the annual reports issued by the respective appointees to the office of D.P.P. and that of Special Prosecutor in the Commonwealth of Australia provides useful insights that sometimes illuminate the bare bones of the statutory provisions. Speaking of the office of Special Prosecutor, Mr. R.V. Gyles, Q.C., in his 1983 Report to the Attorney General wrote:

"The Office of Special Prosecutor is an interesting experiment. Its genesis is in the United States rather than England. In legal and constitutional terms the most significant feature of the Act is the independent discretion to prosecute, representing to that extent a reduction of the traditional role of the Attorney General. In this respect the office has some of the characteristics of a Directorate of Public Prosecutions.

In practical terms, the most significant innovation is the combination of investigation and the ultimate prosecution function under the one umbrella. This does represent some departure from English tradition, although the extent of this can be over-emphasized. After all, the police in effect combine both functions. The difference is that the person who decides to indict is, in this case, at least nominally responsible for conduct of the investigation, and may have actually advised arrest and charge. It may be very difficult to persuade a Special Prosecutor, who has so advised, not to indict. Thus one check and balance of our traditional system is removed. On the other hand, in the field of complex fraud and corporate crime the traditional lines have long since been departed from in practice, although not in theory. For some time it has been common for advice to be taken from externally briefed counsel or from a senior Crown Prosecutor before charges are laid in complex fraud cases. It is also common for outside counsel or senior Crown Prosecutors to conduct committal proceedings. Assuming the defendant to have been committed in cases of this sort the practical benefit of the Attorney General's discretion not to indict may be doubted. The sheer volume of material involved makes it inevitable that the Attorney General or the Solicitor General should rely heavily upon the analysis of that material and the consequent views and opinions expressed by counsel in the case. It is very difficult to imagine a case in which the Attorney General would override the expressed opinion of senior and experienced counsel as to whether there is a case to go to a jury in such circumstances." (Parliamentary Paper No. 257/1983 at p. 10)

As to making the decision whether or not to prosecute in highly complicated cases, the same Special Prosecutor referred to the Attorney General's published guidelines and observed:

"I regard them as a satisfactory guide in making the decision to indict. I am not sure that they are always satisfactory as a guide in making the initial decision to charge. Different considerations may apply at that stage. This is particularly so in relation to complex fraud cases. A prima facie *case may be established upon materials falling short of strictly admissible evidence long before compilation of the final brief of evidence to be presented at the committal proceedings. Indeed, further evidence may be produced during the course of the committal proceedings or between committal and trial. If the compilation of a full brief is awaited before the decision to charge is taken, the risk of the suspect absconding is greatly increased, and the inevitable delays in the court process lead to stale cases being brought, with all the attendant injustice to both*

prosecution and defence. While the decision to charge should never be made lightly, in my view there is a strong public interest in laying charges, where otherwise appropriate, as soon as the prosecution is in possession of material of appropriate credibility which establishes a prima facie *case. From then the matter is in the hands of the courts where adequate protection of the legitimate interests of both prosecution and defence is available. Except in special circumstances I would always provide an opportunity for the proposed defendant to give an explanation before proceedings are commenced."* (Report to the Attorney General, 1984, p. 4)

For his part the first, and to date the only holder of the office of Commonwealth D.P.P., Mr. Ian Temby, has utilized the statutory requirement that he table an annual report to discuss both matters of principle and to provide substantial explanations of all the major decisions taken by himself or in his name. Thus, in his inaugural Annual Report, Mr. Temby declared:

"It is of the utmost importance that the D.P.P. has an independent role secured by legislation. He is a statutory law officer, enjoying security of tenure during the period of his appointment, and subject to control by the Government of the day only by means of statutory directions or guidelines given or furnished by the Attorney General, which must be tabled in each House of Parliament. There have been no such directions or guidelines to date, and it is not envisaged that there will be any in relation to particular cases." (my emphasis)

Answering the rhetorical question "Why a D.P.P.?", the first occupant of the office replied as follows:

"There were two main reasons for creation of a new Office, headed by the statutory law officer who is also a departmental head, and who is required to report to and can only be dismissed by the Parliament. One is to ensure that key decisions in relation to enforcement of the criminal law of the Commonwealth are made on an objective and professional basis, without the fact or appearance of political involvement. This is of prime importance. Any directions or guidelines from the Attorney General to the D.P.P. must be made public, and the Attorney General has made clear that he does not envisage giving them in relation to particular cases with any frequency. *Independence is of prime importance. So is the appearance of independence. Thus the Central Office of the D.P.P. has been established in premises close to but physically separate from the Attorney General's Department."* (my emphasis)

And speaking of the functions to be taken over from the Attorney General the new D.P.P. has written:

"The most important relate to decisions to sign indictments, not to proceed further with prosecutions, and the grant of indemnities to witnesses. In the second area, the Attorney General has agreed not to exercise the power which is reserved to him without consultation with the D.P.P. In the last area, only the Attorney General can grant "transactional" indemnities, but he has agreed to exercise his residual function in this regard only after consultation with, and, except in exceptional circumstances, acting on the advice and recommendation of, the D.P.P."

There remains to record the strong attachment to the separation of functions between the police and prosecutors subscribed to by the present D.P.P. in the State of Victoria. Again, in the course of his paper on "Criminal Prosecution in Victoria" delivered in July 1987 at the Reform of the Criminal Law Conference, Mr. John Coldrey, Q.C. distanced himself from the views exemplified in the 1983 Report by the Commonwealth Special Prosecutor. According to the D.P.P. for Victoria:

"The Office of the D.P.P. has no powers of investigation nor should it. It is highly desirable that prosecutorial authorities do not become involved in investigative activities. Such authorities should always be in a position to exercise an independent and objective judgment in assessing material proffered by the police or similar agencies in support of positive criminal charges.

This objectivity may be compromised when lawyers become intimately involved in the enquiry phase of a potential prosecution. It is for this reason that the "Task Force approach", currently fashionable in some quarters, must be viewed with caution. If the Task Force strategy is adopted it is essential, in my view, that the participating lawyers play no part in either the crucial determination as to whether a prosecution should proceed or any subsequent conduct of it....

The arguments in favour of the separation of the functions of prosecution and investigation have been well rehearsed, not least in the British Report of the Royal Commission on Criminal Procedure 1981 (Cmnd. Paper 8092), and were given concrete effect in the formation of the English Crown Prosecution Service in 1986. The effective autonomy of the Service has not gone unquestioned and it must be conceded that police methods of investigation in an

adversarial environment coupled with the potential of some prosecutors to adopt, through close association, the police perspective, can constitute impediments to the effective weeding out of evidentially insufficient cases. Nonetheless the development of the Service should be welcomed as an important advance towards the introduction of both impartiality and consistency in decision-making." (*ibid.* pp. 3 - 4)

3.7
My own position as manifested in my Viscount Bennett Memorial Lecture at the University of New Brunswick on October 16, 1988

Since I am already on public record as expressing my personal views on the relevance of the Australian experience to the Canadian state of affairs, I conclude this opinion by including the pertinent extracts from my Viscount Bennett Memorial Lecture delivered in October, 1986:

"If the accused is a political or other public figure - and questions of non-prosecution or non-enforcement become known - public reaction is likely to be magnified proportionately. It is in these exceptional situations that confidence in the doctrine of ministerial accountability is put to its most severe test. The State of Victoria, sensitive to the perceptions of political interference, has by its legislation denied the newly-established Director of Public Prosecutions any right to issue guidelines or directives in relation to a particular case. Furthermore, there is an equally explicit prohibition forbidding the D.P.P. in the State of Victoria from becoming involved in the conduct of any individual case. He must be content with the formulation of general policy directives.

In striking contrast to this insulation of the most senior official in the Public Prosecutions Department from the handling of individual cases, the Attorney General of Australia is expressly authorized to give the federal D.P.P. directions in relation to particular cases. These must always be made in writing. What at first sight, however, may seem like the conferring of a potentially dangerous discretion assumes a very different character when it is noted that, in addition to the requirement that the written directive be published in the official Gazette, *the Attorney General is also under a duty to notify Parliament expeditiously of any instructions that he decides to issue to the Commonwealth Director of Public Prosecutions. Wisely, the Australian legislation takes heed of the necessity, that may arise in some cases, to delay the release for public scrutiny of the Attorney General's reasons for intervening, where he is satisfied that the interests of justice require that the contents of his written directions not be disclosed at once. Such postponement will have to be justified*

before the House of Representatives when the case has finally been disposed of.

Difficult as this balancing exercise may turn out to be - adhering to the principle of openness while at the same time having due regard to the protection of the interests of the accused or potential witnesses - I see many positive advantages to following the system of accountability incorporated in the Commonwealth of Australia legislation. A wise Attorney General, no matter what overriding constitutional authority is attached to his office, will refrain from interfering with the day-to-day decision-making process that is carried out by his subordinates. The same policy should govern the stance of the Director of Public Prosecutions with respect to the Crown Attorneys' daily exercise of their discretionary powers. If the right policy guidelines are prepared in collaboration with the Crown's line prosecutors, it should be truly exceptional to find a D.P.P. or the Attorney General becoming personally involved in handling the course of particular criminal proceedings. That remote eventuality, however, must be safeguarded if the position of the Attorney General and the Director of Public Prosecutions are not to become empty constitutional shells incapable of discharging in full the obligations associated with the doctrine of ministerial responsibility." ((1987) 36 U.N.B. L.J. 41)

3.8 Conclusions

Although I have generally refrained in the above opinion from expounding my own reactions to the developments that have taken place in Australia in recent years, it may be helpful if I summarize the main points that derive from the foregoing survey:

(i) Note is taken of the statement made by the Attorney General of Nova Scotia on March 3, 1988 that active consideration is being given by his Department to the establishment of an office of Special Prosecutor along the lines of the United States model created in 1978.

(ii) There are distinct parallels between the Australian experience and the loss of public confidence in the administration of criminal justice exhibited in Nova Scotia in recent times. The first reaction of the Commonwealth Government in Australia was to make ad hoc appointments to the newly created office of Special Prosecutor to handle the allegations of criminal activity on the part of Ministers and public officials. It may be no more than pure coincidence to observe the latest statement by then Attorney General Terence Donahoe, echoing the approach adopted in Australia in the late 1970's.

(iii) It is of some significance that the transition from ad hoc Special Prosecutors to a permanent statutory office of Director of Public Prosecutions was foreseen and strongly advocated by each of the Special Prosecutors appointed by the Commonwealth Government.

(iv) The special status accorded to the office of D.P.P. in the State of Victoria is reflected in the Act of 1982 which accords the holder of that office the status of a Supreme Court Judge. The D.P.P.'s decisions, it is claimed, are thereby more readily accepted by the community.

(v) A comparison between the federal and state legislation reveals a fundamental divergence of approach to the question of the D.P.P.'s independence. According to the Commonwealth statute the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives by instrument in writing. Opportunity is provided to the D.P.P. to express his reactions to any proposed directive before the Attorney General's views are finalized and committed to written form. When the exchange of views has run its course the direction of the Attorney General always prevails.

(vi) The language used in the Victoria statute, on the other hand, appears to be designed in such a way as to preclude the possibility of intervention on the part of the State's Attorney General "in respect to the preparation, institution and conduct" of criminal proceedings by the D.P.P.

(vii) Again, with specific reference to the Victoria legislation of 1982, the D.P.P., while empowered to issue guidelines from time to time to the Crown prosecutors and the police, is expressly prohibited from furnishing guidelines (or directives) in relation to a particular case. No such prohibition is imposed upon the Commonwealth of Australia's Director of Public Prosecutions.

(viii) This approach by the Commonwealth legislation is departed from in the *Special Prosecutor Act of 1982*. While permitting the Attorney General of Australia to issue general directives, such direction is not permitted in relation to the handling of a particular case. Inconsistent as this approach may appear to be on the part of the Commonwealth, the very creation of a Special Prosecutor to deal with a special kind of situation denotes the need for the Attorney General to maintain a hands-off attitude.

(ix) It is important to note that both levels of government have embraced the principle of requiring publication in the official *Gazette* of any and all prosecutorial guidelines or directives. This policy ensures that both legislators and the general public will be in a position to evaluate the grounds on which prosecutorial discretion has been exercised in the name of the State. In the case of the Commonwealth Attorney General this principle of publication in the official *Gazette* extends to any direction that is given in an individual case.

(x) Another area of divergence is the approach adopted by the respective levels of government as it relates to the power to stay proceedings. Thus, the State of Victoria has bestowed upon its D.P.P. the same power to discontinue a prosecution as that exercisable by the Attorney General. The latter's power to enter a *nolle prosequi* is expressly preserved. This arrangement, however, is rejected in the Commonwealth legislation which, using circuitous language, gives restricted authority to the federal D.P.P. to stay criminal proceedings.

(xi) As an integral part of this opinion I have included extensive extracts from the annual or special reports tabled in the legislatures by those who have held the respective offices of D.P.P. and Special Prosecutor during the turbulent years from which Australia is slowly emerging.

(xii) An extract is included from my Viscount Bennett Memorial Lecture at University of New Brunswick in October 1986 in which I express my preference for the options followed by the Commonwealth of Australia. My reasons for doing so derive from my belief that, however exceptional the eventuality may be of a D.P.P. or Attorney General becoming personally involved in the disposition of an individual case, the ultimate authority to do so must be preserved if those offices are not to become empty constitutional shells incapable of discharging in full the obligations associated with the doctrine of ministerial responsibility.

March 23, 1988

IV
The Office of "Special Prosecutor" or "Independent Counsel" - The United States Experience

Reference to a "Special Prosecutor" in the context of United States federal law evokes memories of the appointment of Archibald Cox to handle the allegations of criminal activity arising out of the Watergate affair and his subsequent dismissal by President Nixon on what has come to be remembered as the "Saturday night massacre". This opinion will not concern itself with the details of Watergate or the vicissitudes which beset the Watergate Special Prosecution Force as it steadfastly proceeded towards its goal of determining what criminal proceedings should be instituted, for what offences, and against which defendants.

4.1
Introduction - some recent historical background

Recollections of the testimony adduced before the Senate Select Committee on Presidential Campaign Activities (perhaps better known as the Watergate hearings) under its chairman, Senator Sam Ervin, may have become blurred with the passage of time. But one of the major features to emerge from those televised proceedings was the perception that the U.S. Department of Justice, presided over by Attorney General John Mitchell, had allowed itself to become subject to interference and, in some instances, direct control, by members of the White House staff with the approval of President Nixon himself. The fundamental objection to the accommodating position taken by the Department of Justice officials with respect to directions from President Nixon and his senior staff was their failure to keep "partisan politics" and the "administration of justice" separate. This, of course, is an overly simplistic conclusion when stated in such a bare fashion but the underlying message was heard and debated vigorously in the wake of the Watergate hearings. Prominent among the agencies which examined the problems associated with the Department of Justice were the Watergate Special Prosecution Force itself (see its Final Report, U.S. Govt. Printing Office, 1975, Appendix L which contains an exhaustive bibliography of Watergate source materials) and the American Bar Association's Special Committee which published a report the following year entitled "Preventing Improper Influence on Federal Law Enforcement Agencies".

Plentiful as were the criticisms voiced in the above reports there was no immediate consensus as to the reforms that should be introduced to overcome the core deficiencies in the pertinent institutions of government. With Senator Ervin leading the way a series of Congressional Bills were introduced that finally were incorporated in the Watergate Reorganization and Reform Bill. The basic purpose of this measure was to make the federal Department of Justice an independent agency. Prominent among its provisions was the principle that anyone who had previously occupied a high level

campaign position or assumed a leading partisan role in the election of the President was to be ineligible for appointment to the offices of Attorney General and Deputy Attorney General of the United States (see Bill S. 495, H.R. 94th Congress, 2nd Sess. §594(c)). Whether we look to the past or to the present there is no ground for concluding that the obvious wisdom of such a principle is universally accepted by those who have occupied the Presidency of the United States. The present incumbent, President Reagan, in appointing Edwin Meese, his former campaign manager, to the Attorney Generalship (after first serving a spell in the White House as Counsellor to the President) acted no differently than his predecessors, amongst whom can be named Franklin Roosevelt, Dwight Eisenhower, Harry Truman, John F. Kennedy and Richard Nixon. In drawing attention to these earlier precedents the A.B.A.'s Special Committee observed:

"The close connection between politics and the office of the Attorney General has seriously reduced the effectiveness of the Department of Justice, inflamed fears about the integrity of the administration of justice and created a substantial credibility gap in the minds of the public." (*op. cit.* p. 38)

Relatively little argument was heard during the passage of the Watergate Reorganization and Reform Bill with respect to, at least to our ears, such strange sounding provisions as those that have brought about the establishment of the Office of Government Crimes and the Office of Professional Responsibility as integral divisions of the federal Justice Department. The mandate of the Office of Professional Responsibility, which it has actively pursued since its inception, is to ensure that decisions in criminal cases are made professionally and untainted by politics. I have read its reports and met with the small band of lawyers who make up the division. They take their responsibilities seriously and the rest of the Department of Justice take their functions equally seriously.

4.2 The office of Special Prosecutor as envisioned in the abortive Watergate Reorganization and Reform Bill

The main focus of Congressional attention in 1976 was directed towards the proposed establishment of a permanent office of Special Prosecutor. As envisioned in the Watergate Bill the Special Prosecutor would have jurisdiction, independently of the Attorney General, to investigate and prosecute possible offences by the President, the Vice-President, Members of the Congress, the Federal Judiciary, the Attorney General and the Director of the Federal Bureau of Investigation (*ibid.* s. 592(a)(1)). Appointments to the office would be for three years with no option for renewal

(*ibid.*, s. 591(b)). A groundswell of opposition to the notion of a permanent Special Prosecutor soon became evident. It was launched from many quarters, foremost amongst which were the new Attorney General (Edward Levi) and the Deputy Attorney General (Harold B. Tyler) who were appointed by President Gerald Ford on succeeding to the White House in August 1974 (see "New York Times", 22 July 1976). Other opposition was voiced in the final report of the Watergate Special Prosecution Force (see pp. 136-138) and by the A.B.A.'s Special Committee (*ibid.*, pp. 92-110), reversing that body's earlier stand on the matter in October 1973 following the summary dismissal of Archibald Cox by President Nixon (*ibid.*, p. 81).

Before turning to examine the specific reasons advanced in rejecting the Bill's proposals let me summarize the legislative outcome of this initial attempt to rectify the problems associated with Watergate. In an abrupt and unexpected switch, on the eve of the Republican National Convention in 1976 to nominate its presidential candidate, Gerald Ford accepted a compromise provision to the same Bill whereby the Special Prosecutor would be a permanent official to be appointed by the President but located in the Department of Justice ("New York Times", 20 July 1976). How far such an office would have achieved true independence from White House oversight can be judged in part by the terms of the Bill which would have safeguarded the appointee from peremptory dismissal except in circumstances where the holder was found to have committed extraordinary improprieties, the self same safeguards that failed to protect Archibald Cox, the first Watergate Special Prosecutor, when the crunch came and President Nixon fired him for his intransigent determination to secure access to all the famous Nixon tapes.

With the advent to power of President Carter, the Senate's Bill lapsed into apparent obscurity but its basic message was not forgotten. Within a relatively short period of time Congress was finally persuaded to enact legislation creating a mechanism for the appointment of ad hoc temporary Special Prosecutors. This machinery formed part of the *Ethics in Government Amendment Act* of 1978 (Public Law No. 95-521). By its terms, the Act was to cease to have effect in 1983, five years after the date of its enactment. The statute was amended, however, by the *Ethics in Government Act* Amendments of 1982, (Public Law No. 97-409). Among the changes effected by the amendments were: (i) extending the sunset date of the Act until January 3, 1988, and (ii) changing the name of "special prosecutor" to "independent counsel". It is with the provisions of the current legislation that the main emphasis of this opinion will be concerned. For ease of reference I will cite the pertinent provisions that now constitute Chapter 39 to Title 28 of the United States Code. For the moment, I propose to concentrate on the specifics of the

prevailing legislation. Later on I shall turn my attention to the intense debate that has gone on in fits and starts ever since the Watergate affair. At the heart of this debate is the principle of accountability and whether the paramount necessity was to establish a permanent or a temporary office of Special Prosecutor. One further word of explanation. Because of the greater familiarity associated with the term "special prosecutor", and its invocation by the Attorney General of Nova Scotia in speaking of possible reforms being explored by his Department, I shall mainly refer to the former designation - that of special prosecutor. If, occasionally, I lapse into referring to the "independent counsel" it is intended to have the same connotation as "special prosecutor". This may be confusing but I see no other way to simplifying the problem of nomenclature.

4.3 The Special Prosecutor's office and its attendant mechanisms as formulated by the *Ethics in Government Act, 1978* and the *Ethics in Government Amendment Act, 1982*

To facilitate an understanding of the unique procedures that are part of the Special Prosecutor's law in the federal jurisdiction of the United States I propose to follow a chronological approach. This will briefly describe each step in the procedure that activates the machinery, sets the pertinent criteria, confers authority to make such appointments and then establishes the subsequent process of accountability.

(i) *Targets of the legislation*

The federal officials whose activities fall within the purview of a Special Prosecutor's powers of investigation and prosecution are as follows:

(a) the President and Vice-President;
(b) Cabinet Officers;
(c) Director and Deputy Director of the Central Intelligence Agency;
(d) Commissioner of the Internal Revenue Service;
(e) any Assistant Attorney General or persons occupying positions in the Department of Justice compensated at rates at or above Level III of the Executive Schedule (this includes the Director of the F.B.I. and some of his senior associates in the Bureau);
(f) officials in the Executive Office of the President who are compensated at or above a rate equivalent to Level IV of the Executive Schedule;[7]
(g) the Chairman and Treasurer of the principal national campaign committees seeking election or reelection of the President and any other officer of the campaign exercising authority at the national level, such as the campaign manager or director.

7. Commenting on this category, former Attorney General Civiletti has pointed out that, in all, some 240 persons are covered, most of them unknown to either the general public or the Department of Justice. Most hold considerably subordinate positions. (see 34 Southwestern L.J. 1043, 1054)

(ii) *The preliminary investigation*

Under the statute, the Attorney General is required to conduct a preliminary investigation, which may last up to 90 days, whenever he receives specific information from a credible source that one of the above listed officials may have violated a federal criminal law, other than a Class B or C misdemeanour or an infraction. Furthermore, the specific information required to trigger a preliminary investigation does not have to include information with respect to every element of a crime.

(iii) *Application for the appointment of an independent counsel*

If the Attorney General finds, at the end of the preliminary investigation, reasonable grounds to believe that further investigation or prosecution is warranted, he must apply to a special division of the United States Court of Appeals for the District of Columbia for the appointment of an independent counsel. The Attorney General must also apply to the special division for appointment of an independent counsel if he fails to determine, after 90 days, that there are no reasonable grounds to believe that further investigation or prosecution is warranted. In making that determination the Attorney General is to comply with the established policies of the Department of Justice with respect to the enforcement of criminal laws. In short, the Attorney General is to perform no more than a screening process - he is not expected to exercise a judgment as to the degree of culpability, moral or otherwise, in a particular case. Neither is he required to weigh the relative credibility of the official under suspicion as opposed to that of other potential witnesses. Those are tasks to be discharged by the Special Prosecutor.

(iv) *Authority for the judicial appointment of an independent counsel*

The special division of the court to which the Attorney General applies for appointment of an independent counsel is composed of three Federal judges or justices in the District of Columbia (*i.e.*, Washington D.C.) who have been assigned to such division for a two-year period pursuant to 28 U.S.C. 593(f).

The identity and prosecutorial jurisdiction of an independent counsel is not to be made public unless the Attorney General so requests, or unless the division of the court determines that disclosure of this information would be in the best interests of justice (28 U.S.C. 593(b)).

In the event of the death or resignation (or removal) of an independent counsel, the division of the court is authorized to appoint a new (or acting) independent counsel (28 U.S.C. 593(e)).

(v) *Functions and powers of an independent counsel*

An independent counsel has full authority to investigate and prosecute all matters referred to him, thereby ensuring independence of judgment. Among his specific functions and powers are:

(a) conducting proceedings before grand juries and other investigations;

(b) participating in court proceedings and engaging in litigation, including civil and criminal matters, that he deems necessary;

(c) appealing any decision of a court in any case or proceedings in which he participates in an official capacity;

(d) contesting in court any claim of privilege or attempt to withhold evidence on grounds of national security; and

(e) making applications to any Federal court for a grant of immunity to any witness or for warrants, subpoenas, or other court orders.

(vi) *Submission of reports on his work by independent counsel*

An independent counsel is required to file periodic reports with Congress and cooperate with the oversight jurisdiction of the House and Senate Judiciary Committees. Before his office terminates, he must also submit to the division of the court a report setting forth a description of his work, including the disposition of all cases brought and the reasons for not prosecuting any matter within his prosecutorial jurisdiction which was not prosecuted (28 U.S.C. 595(b)(1), (2)). The division of the court may release to the Congress, the public, or to any appropriate person such portions of the independent counsel's report as the division deems appropriate (28 U.S.C. 595(b)(3)). The division of the court is also authorized to make whatever orders are appropriate to protect the right of any individual named in the report and to prevent undue interference with any pending prosecution, and it may make any portion of the report available to any individual named in the report for the purpose of receiving comments or additional information from such person (28 U.S.C. 595(b)(3)).

(vii) *Tenure of office and grounds for removal*

An independent counsel may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or other condition that substantially impairs the performance of such independent counsel's duties (28 U.S.C. 596(a)(1)). If an independent counsel is removed from office, the Attorney General must submit to the division of the court, as well as to the House and Senate Judiciary Committees, a report specifying the facts found and the ultimate grounds for such removal (28 U.S.C. 596(a)(2)).

An independent counsel who has been removed may obtain judicial review of the removal in a civil action commenced before the division of the court (28 U.S.C. 596(a)(3)). The division of the court may at any time terminate the office of independent counsel on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel has been substantially or fully completed (28 U.S.C. 596(b)(2)). Upon such termination, the independent counsel must file his report with the division of the court.

(viii) *Jurisdiction*

One final comment on the subject of jurisdiction. Under the provision of 597, whenever the independent counsel has assumed prosecutorial jurisdiction of any matter, the Department of Justice, the Attorney General, and all other officers of the Department are required to suspend all investigations and proceedings regarding such matter except insofar as the independent counsel agrees in writing to such action being taken. Nothing in Chapter 39 of 28 U.S.C. precludes the Attorney General or the Solicitor General of the United States from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity.

Dissatisfaction with various elements of this procedural mechanism continues to be heard on the part of different interested parties. Some of these criticisms may have a particular bearing on the Nova Scotia approach to the same questions, so I propose to address the more prominent of these issues in a later section of this opinion. Before doing so, it is time now to take a look at some of the authoritative pronouncements which have accompanied the institution and development of the office.

4.4
Some authoritative views on the necessity for an independent Special Prosecutor as exemplified in the American legislation

The appointment of Archibald Cox as Special Prosecutor in the Watergate affair was not utterly unprecedented. So far as my own reading on the subject is concerned, there had previously been only one other clear precedent in the entire history of the United States republic. It occurred as a result of the famous Teapot-Dome scandal in 1924 which implicated Harry Dougherty, Attorney General in President Harding's Administration. Harding's successor, President Coolidge, appointed a private lawyer, Owen Roberts, to conduct the prosecution of some of the resultant cases. Roberts was subsequently appointed a Justice of the U.S. Supreme Court.

When, therefore, serious shortcomings were perceived to be attached to the Department of Justice's original investigation of the Watergate burglary, the Senate, in its confirmation hearings of the new Attorney General, Elliot Richardson, extracted a promise from Richardson that he would appoint an independent, disinterested lawyer of national reputation to renew the investigation and prosecute any wrongdoer who had not been brought before the courts. No legislation comparable to the *Ethics in Government Act* existed at that time but, as has been pointed out by another Attorney General, Benjamin R. Civiletti (see (1981) 34 Southwestern L.J. 1043, 1052), the appointment of special prosecutors has never *per se* required special legislation. Attorney General Elliot Richardson appointed Professor Cox under the terms of a general statute, still on the books, that gives the Attorney General of the United States authority to appoint lawyers outside the Department of Justice to handle governmental business in special cases (28 U.S. Code 515). Apparently, this power is invoked with some frequency in civil cases but, according to Civiletti, it is extremely rare to utilize the same authority in the area of criminal law. The former Attorney General views the Ethics in Government legislation as an outgrowth of the former discretionary authority but with very different procedures in terms of appointment, tenure and accountability.

It might be pertinent at this point to confirm the existence in the Penal Codes of the various States a similar general power to appoint special prosecutors to handle specific assignments. One prominent illustration, in very recent times, was the Howard Beach trial in Queens, New York City, arising out of the death of a Black man who had been pursued to his death by a White mob. The appointment of a special prosecutor by the local District Attorney was explained on the grounds of the close relationships between the local prosecutors and the police but it was also evident that the appointment was necessary if the testimony of the surviving victims was going to be assured and cooperation established with the Queen's District Attorney (see "New York Times", 31 March 1988). There is nothing extraordinary about this kind of situation, and the same observation

can be made in a Canadian context where provincial Attorneys General have been known to make ad hoc appointments of a special Crown prosecutor, and to do so sometimes from outside the ranks of the provincial Bar in order to demonstrate the objectivity of the ensuing criminal proceedings. What we are presently concerned with, of course, are the distinctive features of the current United States federal law as summarized in the previous section of this opinion.

Earlier I made reference to the long standing objections that have repeatedly been voiced by the United States Department of Justice in its detailed submissions to the series of Congressional Committees that, from January 1973 to 1987, have undertaken intensive reviews of the office of Special Prosecutor and its corresponding title, that of independent counsel. The Justice Department has seen its turf invaded by Congressional legislation that curtails the Attorney General's prerogatives. Apart from the major concerns it has consistently expressed on the constitutionality of the independent counsel statute, the Justice Department's principal witnesses were successful in the 1983 amendments in sustaining the Department's criticisms with respect to some aspects of the independent counsel's discretionary authority.

From the very beginning of the public debate surrounding the office of Special Prosecutor one of the major policy questions was to determine whether a permanent or temporary position should be established. The most pronounced reform measure would have been the establishment of a permanent standing office described by one writer as "an autonomous, vigilant bulwark against criminal activity by high ranking government officials" ((1984) 67 Judicature 486, 490). The objections to this solution to the problem, and which embodied the arguments that eventually led to the adoption of the prevailing temporary arrangements, were captured in the testimony of Professor Samuel Dash, former Chief Counsel to the Senate Select Watergate Committee, who addressed the House of Representatives as follows:

"The term of office is especially relevant to the question of the availability of men of stature and competence for such a position as special prosecutor. If the office is a temporary one, created to deal with a particular scandal or crisis, then one can expect to find some outstanding lawyers in the country who would be willing to undertake the job for a short term. However, if the post is a regular permanent one, with no particular investigation upon which the country was focused, it is difficult to imagine top caliber trial lawyers being willing to undertake the assignment, unless it is on route to a judgeship - and that is exactly what we should be trying to avoid.

The fact that it is a regular office in the Department of Justice, independent though it may be called, requiring the occupant to find his own work to do, will make it attractive to ambitious young lawyers on the make, or safe party loyalists. In quiet times there will be little need for the President to select a courageous idealist. And if the President should even want to, it would be difficult to find a taker because of the lack of tenure in the job to really tackle a tough investigation." (Hearings Before the Subcommittee on Criminal Justice, House of Representatives, H.R. 14476 *et al.*, 94th Cong., 2nd Sess., at 124.)

The same concerns about the dangers that were perceived to be associated with a permanent office of special prosecutor are to be found expressed in the Final Report (1975) of the Watergate Special Prosecution Force where it is stated:

"Central to the question is the fact that such a public officer would be largely immune from the accountability that prosecutors and other public officials constantly face. Lack of accountability of an official on a permanent basis carries a potential for abuse of power that far exceeds any enforcement gains that might ensue. An independent prosecutor reports directly on ongoing investigations to no one, takes directions from no one and could easily abuse this power with little chance of detection. Although matters that reach court obviously invoke court control over a prosecutor's public conduct, the discretionary process of initiating and conducting investigations bears great potential for hidden actions that are unfair, arbitrary, dishonest, or subjectively biased." (loc. cit.)

Persuasive as the above arguments undoubtedly appear to have been in persuading Congress to adopt the temporary option, the powerful voice of Archibald Cox has now been heard urging the legislators on Capitol Hill to reenact the *Ethics in Government Act* without limitation of time. Addressing a sub-committee of the U.S. Senate Committee on Governmental Affairs in March 1987, the original Watergate Special Prosecutor declared:

"Effective government in a free society depends upon public confidence that all officials are governed by law and, upon violation, are subject to the same pains and penalties as other citizens. That confidence can be preserved in the face of credible charges of wrongdoing high in the Executive Branch only by providing for a vigorous, impartial, and fair-minded investigation by a prosecutor not linked to the President or his principal aides by personal, political, or official association. A special mechanism is

required in such cases because the normal law enforcement officials, the Attorney General and his subordinates in the Department of Justice, are inescapably so closely linked to the President and his administration by political and often personal ties as to create a severe conflict of interest, even the appearance of which would erode public confidence in the integrity of a Department of Justice investigation. The Teapot-Dome and Watergate scandals amply demonstrated the need. Since 1978 Title VI has provided the necessary machinery, but it will expire in January 1988.

Title VI should be reenacted as permanent legislation because events demonstrate the need for such machinery. The need for detached, impartial investigation of the sale of arms to Iran and provision of unauthorized aid to the Contras would be sufficient illustration. In fact, it has been necessary to appoint special prosecutors or independent counsel at least six times during the past six years to investigate charges of criminal misconduct against high officials.

The procedure established by Title VI is preferable to a system in which the Department of Justice hires individuals to conduct investigations and prosecutions of high level officials for four reasons:

First, the conflict of interest that inevitably casts doubt upon investigation and prosecution by the Attorney General also precludes leaving the decision to appoint a special prosecutor to his discretion.

Second, there is too much danger that public misgivings resulting from the same conflict of interest would lessen confidence in the detachment and impartiality of a special prosecutor selected by the Attorney General. Judicial selection builds such confidence.

Third, it is difficult to secure complete independence for a special prosecutor appointed by the Attorney General. He can always be removed.

Fourth, it is desirable to have a court determine whether and when to release to the public reports and other relevant papers."
(Hearings before the Sub-Committee on Oversight of Government Management, 100th Congress, 1st Sess., March 19, 20, 1987, pp. 194-195, U.S. Govt. Printing Office.)

Professor Cox, it will be noted, is not advocating any departure from the ad hoc characterization of the individual appointments to the office of special prosecutor or independent counsel. What is being urged upon the Congress is the need to transform the short term duration of the governing legislation into unlimited duration. As to the essential attributes of the statutory provisions previously summarized, Professor Cox had certain specific suggestions but in the main he expressed his strong support for the continued existence of the Ethics in Government machinery. To this must be added his rejection of the arguments that will surely be advanced before the U.S. Supreme Court challenging the constitutionality of the legislation.

4.5
The constitutionality question now before the United States Supreme Court

Anyone who has been following the recent Iran-Contra controversy in the United States will be aware that, among the issues that have spilled over into the courts, is the challenge mounted by Lt. Col. Oliver L. North to the constitutionality of the federal law governing the appointment of Lawrence E. Walsh, the independent counsel appointed in 1986 by the Special Division of the District of Columbia Court of Appeals to handle the wide ranging investigations into the arms sales and diversion of U.S. public funds. Similar challenges had been mounted somewhat earlier arising out of a case directed against Michael K. Deaver, a former White House Deputy Chief of Staff, by another independent counsel, Whitney North Seymour Jr., in a totally different set of circumstances. The rulings in these separate proceedings, at the appellate level, have not been consistent. Consequently, the matter has now been referred to the U.S. Supreme Court for a final determination.

Interestingly, in the case of the Iran-Contra independent counsel, action was taken by the Attorney General, Edwin Meese, in an attempt to foreclose the pending challenges to the legitimacy of Lawrence Walsh's appointment. The procedure adopted was to confer upon the independent counsel a parallel authority derived from the Attorney General's inherent statutory authority under the provisions of 28 U.S.C. 509, 510 and 515 and 5 U.S.C. 301. To reinforce the multi-based authority of Walsh, the newly promulgated federal regulation (28 CFT Parts 600 and 601) also invoked the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution. According to the Attorney General's public statement accompanying the parallel appointment:

"This authority is being exercised because of the pending lawsuit captioned North *v.* Walsh and Meese, *D.D.C. No. 87-0457, which*

challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act *(28 U.S.C. 591* et seq.*). The President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act. In addition, I note that I have already determined that this matter is appropriate for further investigation. In light of the President's views, I have found it advisable to assure the courts, Congress and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the North litigation. Thus, this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is intended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner."* (See the Federal Register, Vol. 52, No. 46 of March 10, 1987.)

In attempting to pinpoint the fundamental nature of the constitutional dispute surrounding the office of independent counsel it really boils down to defining the boundaries of the United States version of the separation of powers doctrine. The position of the Department of Justice, consistently adhered to ever since the *Ethics in Government Act* was enacted in 1978, is that federal law enforcement is "quintessentially and exclusively" an executive branch function. Objection is taken to the Congress transferring the authority to appoint the independent counsel to the judicial branch of government in the form of a special panel of federal judges in the District of Columbia. The Justice Department's stance on this constitutional question is contained in its submission to the March 1987 hearings before the Senate Sub-committee on Oversight of Government Management, and prepared by John R. Bolton, Assistant Attorney General in charge of the office of Legislative and Intergovernmental Affairs. The department's brief stated:

"For the past fourteen years, this Department has had an opportunity to testify on a number of occasions on the independent counsel statute and the various legislative proposals that led up to its enactment in 1978. With a single exception, on every such occasion our testimony has included questions concerning the constitutionality of legislation that would remove the function of prosecuting crimes from the Executive and lodge it in an individual who is neither appointed by nor removable by the President or the Attorney General. In 1973, Acting Attorney General Bork, testifying before the House Judiciary Committee, objected to a bill that would

have provided for judicial appointment and removal of a special prosecutor. He argued that the prosecution of crimes is an executive function which cannot be controlled by the judiciary. In 1974 and 1975, Department of Justice officials testified before the Senate Judiciary Committee on a variety of bills to create a permanent prosecutorial office that would operate independent of the President's supervision and control, concluding in each case that under our system of government the prosecution of crimes is a core executive function which cannot be removed from the control of the Executive.

In 1976, Attorney General Levi raised constitutional objections before the Subcommittee on Criminal Justice of the House Judiciary Committee to provisions in a bill quite similar to the legislation finally enacted in 1978. Testifying before a Senate committee on another piece of legislation that same year, Deputy Attorney General Tyler also objected to the limitations placed on the Attorney General's power to remove a court-appointed special prosecutor.

After enactment of the present statute, Attorney General Smith in 1981 informed the Senate Legal Counsel of the grave doubts the Department still entertained over the statute's constitutionality, noting in particular the questionable mechanisms for appointment and removal of the special prosecutor. The Attorney General argued that federal prosecutors "must be accountable to the President or the Attorney General." And during the last round of reauthorization hearings, the Associate Attorney General urged repeal or modification of the special prosecutor provisions on grounds that they improperly insulate the exercise of an executive function from the control of the President." (*op. cit.*, pp. 110-112)

The examination of the Attorney General's representative by members of the Senate Sub-Committee was forceful and to the point. Senator Cohen observed that if, as the Assistant Attorney General had suggested, the refusal of a special prosecutor to follow an order of the President or Attorney General were grounds for removal "then there is no independence of that counsel". The chairman of the Sub-committee, Senator Carl Levin added: "What you're asking for is not going to happen I hope... You want us to gut the statute, there's no other way to say it." To adopt the Justice Department's arguments, Senator Levin added, whereby the Attorney General is accorded the authority to appoint, control and dismiss special prosecutors, would be "to return us to where we were in 1973" the year that President Nixon ordered the dismissal of the Watergate special prosecutor, Archibald Cox (*op. cit.*, pp. 8-18).

There has been no lack of responsible and informed support for an interpretation of the U.S. Constitution that recognizes the constitutionality of the machinery established by the *Ethics in Government Act* of 1978 and its amendments enacted in 1983. I will content myself with citing two opinions. The first is that of the former Attorney General of the United States, Benjamin R. Civiletti, who was appointed to that office directly from the position of Deputy Attorney General in the Justice Department. In his testimony before the same Senate Sub-committee in March 1987, Civiletti declared:

*"I believe that the mechanism in the Act through which the independent counsel is appointed can and should easily withstand constitutional scrutiny. In my view, the independent counsel is an executive branch official. I am aware of nothing in either the text of the Constitution or in settled principles of jurisprudence that would require the appointment of an executive branch official to be made in every instance by the executive. In fact, the Appointment Clause of the Constitution (Art. II, 2, cl. 2) expressly vests in the "Courts of Law" the power to appoint inferior officers. And it has been established at least since 1880 (*Ex parte Siebold, *100 U.S. 371 (1880)), that inferior officers appointed by the courts could exercise executive functions.*

In the end, any constitutional challenge to the appointment mechanism will founder on one irrefutable fact -- there is no good alternative. The concept of an independent counsel has become generally accepted because of a perception that the Attorney General, a presidentially appointed official, cannot always be relied upon to enforce the criminal law impartially against those in the highest offices of the Government. My personal view, as a former Attorney General and a subordinate Justice Department official under another Attorney General, is that the underlying perception is wrong: the Justice Department can and should be trusted to investigate and prosecute anyone, no matter what his or her office is. But given the perception, the power to appoint the independent counsel should reside, in the first instance, outside the Executive Branch, or else the same perception that now disqualifies the Justice Department would also attach to the independent counsel. The appointment power cannot rest with Congress: the Constitutional text does not support its residing there, and vesting the power in Congress could turn the appointment of an independent counsel into a partisan effort. The appointment power should stay in the special court, exercisable pursuant to the existing mechanism."
(*op. cit.*, pp. 269-271)

The second opinion, expressed in a letter tabled before the Senate Judiciary Committee in 1973, is by Professor Paul Freund who wrote:

"Questions have been raised concerning the constitutional authority of the Congress to vest in a court the appointment of a Special Prosecutor in succession to Professor Cox. Having given some thought to the problem, I am venturing to express my opinion that such authority does exist. In this conclusion I am in agreement with the statement issued several days ago by [50] law school Deans.

The Constitutional text is clear. Article II, Section 2 provides:

"...but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Any limitation on this express power must arise from implications of the Constitution. There appears to be no case holding invalid an appointing power vested in the courts, though a variety of appointments have been so vested, ranging from marshals of the courts and temporary United States Attorneys to supervisors of federal elections and members of the board of education of the District of Columbia. (See Hobson *v.* Hansen, *265 F. Supp. 902, 911* et seq. *(D. Col. 1967), per Fahy, J.)*

The challenges that have been advanced and rejected in cases of judicial appointments have invoked the doctrine of separation of powers, more specifically, that the appointing power vested in courts should relate only to offices concerned with the administration of justice. In the leading case of ex parte Siebold, *100 U.S. 371 (1879), the Supreme Court refused to place this limitation on Article II, Section 2, and upheld the vesting of authority in the circuit courts to appoint supervisors of federal elections. The duties of such officers appear to be less germane to the judicial branch, and more naturally thought of as "executive," than the duties of a special prosecutor charged with investigation and prosecution of offences within the higher reaches of the executive department itself.*

Refusing to fetter the Congressional choice of the appointing authority, the Supreme Court put to one side cases involving the performance of non-judicial duties by judges themselves. The appointing power is specifically authorized by the Constitution, the Court observed, and Congress will decide where it may be most appropriately vested, unless there is manifest "incongruity" in the judicial appointment... From the standpoint of "propriety" or

"congruity" the judicial appointment of a Special Prosecutor in the present circumstances rests on a firmer footing than a similar appointment of election supervisors or of United States Attorneys while a vacancy exists. Though limited in tenure until the President and Senate agree on an appointee, a United States Attorney appointed by the court assumes all the powers of the office, regardless of subject matter. The limitation of subject matter in the case of a Special Prosecutor even more clearly satisfies the criterion that the appointment not be "incongruous". Indeed, it could with reason be thought that in all the circumstances incongruity would inhere in an executive appointment.

The Special Prosecutor would be as independent as it was originally contemplated he should be. To this end, it might be appropriate to vest his appointment in no single judge but in the judges of the District Court. Moreover, he would be removable only for specified cause, such as "extraordinary improprieties," again as originally contemplated.

Provision for removal by the body that appointed him would raise no further problems. The power of removal (aside from impeachment) is not dealt with in the Constitution. It has been assumed that the power to appoint carries with it the power to remove, save that where the office requires a measure of independence Congress may protect the functioning of the appointee by placing qualifications on his removal... The same considerations that support judicial appointment apply to judicial removal subject to the specifications of grounds for removal in the interest of independence.

The power conferred on Congress in Article II is reinforced by the power conferred in Article I, Section 8, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof". That justice shall be done and shall be seen to be done is a paramount and legitimate concern of the Congress. That concern requires no extra-constitutional powers. It does serve to caution against raising barriers to the exercise of the power expressly granted by Article II.

*In the present state of affairs it may not be amiss to recall the classic words of Chief Justice Marshall, which Justice Frankfurter used to describe as the single most important utterance on constitutional interpretation: "This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." (*McCulloch *v.* Maryland, *4 Wheat. 316, 415 (1819)). " (93rd Congress, 1st Session, Nov. 1, 1973, pp. 164-166.)*

This letter from Professor Freund of Harvard Law School, one of the foremost constitutional authorities in the United States, was written before the *Ethics in Government Act* was placed on the statute book. It presages the procedure ultimately adopted by the Congress. Having read the various opinions expressed by the leading protagonists in the constitutional dispute I would be inclined to view with confidence the outcome of the Supreme Court's ruling on the question. It is likely to put to rest once and for all the Justice Department's extreme arguments against the involvement of the judicial panel in making the original appointment of a special prosecutor and thereafter overseeing the discharge of the court's mandate. In expressing this opinion upon the probable outcome of the United States dispute I do not intend in any way to lend my support to the importation of a similar mechanism into the Canadian approach to solving the problem of securing independence in the exercise of prosecutorial discretion.[8]

8. By a vote of seven to one the Supreme Court in *Morrison, Independent Counsel* v. *Olson et al.*, upheld the constitutionality of the independent counsel provision of the *Ethics in Government Act* of 1978 (see No. 87-1279, decided June 29, 1988).

4.6 A critique of the United States Department of Justice Organization and its inherent flaws

In his Cecil Wright Memorial Lecture in the University of Toronto Law School in April, 1976, under the title "Watergate and the Constitution of the United States", Professor Archibald Cox made an observation that has a special pertinence when placed alongside the circumstances presently being investigated by this Royal Commission. Cox recalled:

"Last year, while I was in England, some perceptive friends suggested that the British constitution is the more likely to prevent Watergate-like offences but that the United States dealt with them better than Britain could have done after the wrongs occurred. My friends contrasted the open collegiality of the British cabinet with the monarchical characteristics of the modern United States presidency. The British cabinet, they suggested, was a defence against such silly, and also evil, ventures; but they went on to observe that the freedom guaranteed the press by the First Amendment to the U.S. Constitution and the existence of an independent Congress, armed with strong investigating committees, provided better means for ferreting out and disclosing any official wrongdoing after it occurred." ((1976) 26 Univ. of Toronto L.J. 125, 128)

The more I study the different constitutional systems that are in place across the spectrum of the English speaking world the less convinced I become that the formal structures of government guarantee the fulfillment of an impartial and independent administration of justice. To confine myself for the moment to the contrasting models referred

to in the above-quoted passage, the Cabinet mode of government in Nova Scotia, as in Britain, has not provided its citizens with any systematic protection against the kind of wrongdoing which has surfaced in the course of this Royal Commission's investigations. Other provinces too, and the federal government, have provided their own share of abuses of the criminal justice system. To suggest, therefore, an innate superiority of the Cabinet system of government over the presidential mode as a bulwark against governmental wrongdoing is patently unsupportable.

Likewise, despite the undoubted unique characteristics of the First Amendment to the U.S. Constitution, constantly invoked by the American press and other media and carefully nurtured by the U.S. Supreme Court, we in Canada (and in the United Kingdom) have witnessed many Royal Commissions, Commissions of Inquiry and other forms of public hearings, which have succeeded in penetrating into the innermost secrets of every branch of government. Less obvious is the fate of recommendations derived from any of these different approaches in our respective countries. One has only to look at events associated with the Reagan Administration to see how ineffectual the whole of the post-Watergate reforms have been when there does not exist a concomitant commitment at the highest levels of government to the principles embodied in the Ethics in Government legislation. An understanding of the constitutional expectations associated with the office of Attorney General and exhibited by whoever happens to be in charge of that office, is critical to any evaluation of the U.S. laws dealing with general and special prosecutions. The contrast between the incumbencies of Edward Levi and Griffin Bell (serving a Republican and Democrat President, respectively) and that reflected in the conduct of John Mitchell and Edwin Meese (as it happens, both serving Republican Presidents) is so pronounced as to raise serious questions about the organization of the Justice Department and the powers associated with its head, the Attorney General of the United States.

As may be already known, the U.S. Department of Justice is constituted into several divisions. The appointment, at the beginning of every Presidency, of persons to head each division, is geared towards the selection of individuals who are either avid supporters or, at least, in sympathy with the political philosophy of the new President and his choice as the Attorney General. As I see it, the machinery established by the Ethics in Government statutes has not eradicated something that is inherently flawed in the very nature of the U.S. Department of Justice. As the former Justice of the United States Supreme Court, Arthur Goldberg, has perceptively observed, if the Attorney General and the Department of Justice were truly independent there would be no need for a Special Prosecutor, adding

that the tendency of the United States was always to create new institutions instead of focussing responsibility and insisting upon its proper exercise by existing officials (quoted in the A.B.A. Report, p. 84). To an outside observer, the testimony of a former leading United States Attorney is irrefutable when he declared that there is a fundamental conflict of interest permeating the operations of the Department of Justice. "Loyalty to the political interest of the administration" said Whitney J. Seymour Jr. "often requires disloyalty to the goal of impartial justice... The divergent roles of political advisor and chief law enforcement officer must be definitely and sharply separated... No man can serve two masters, particularly when their objectives are frequently and sometimes completely opposed" (*op. cit.*, pp. 35-36). The prevailing situation portrayed in this passage differs markedly from the interpretation of his responsibility by Edward Bates, Attorney General in President Lincoln's administration, when he said: "This office I hold is not properly political, but strictly legal: and it is my duty, above all other ministers of state, to uphold the law and to resist all encroachment, from whatever quarter, of mere will and power" (*ibid.* p. 32).

Far from seeking to express a sweeping condemnation of the Justice Department and its staff of 3,600 lawyers there is plenty of evidence to confirm the existence of a very broad commitment, amongst the senior and not so senior lawyers employed in the department, to the highest professional ideals. In this regard I draw attention to the Proceedings of a Conference held at the University of Virginia in January 1980, and published under the title "The President, the Attorney General and the Department of Justice"; also to a recent and remarkable analysis of the internal struggles within the federal department with respect to sustaining the longstanding tradition of political independence associated with the Office of Solicitor General of the United States (see "The Tenth Justice", in "The New Yorker", Aug. 10 & 17, 1987); and to the most recent resignations of Deputy Attorney General Arnold J. Burns and Assistant Attorney General William F. Weld, head of the Justice Department's Criminal Division, who are quoted as saying that the Department's reputation was being "severely tarnished by Mr. Meese's continued presence as Attorney General" ("New York Times", March 30, 1988). The following day, the Solicitor General was reported as having advised Edwin Meese to resign his office as Attorney General, but with the publicly declared support of the President there is no indication of an impending change at the head of the Justice Department.

4.7 Some aspects of the U.S. Special Prosecutor law viewed from a Canadian perspective

Leaving aside the fundamental problems inherent in the multi-faceted functions of the U.S. Department of Justice - these include responsibility for the F.B.I., the U.S. Attorneys, the Federal Bureau of Prisons, the U.S. Parole Board, immigration and naturalization, anti-trust enforcement, civil rights, civil litigation and judicial appointments - what aspects of the federal Special Prosecutor law are of particular importance from a Canadian perspective? I shall confine myself to three issues only:

(i) the limitations on the targets amenable to a special prosecutor's jurisdiction,
(ii) the resort to temporary ad hoc appointments, and
(iii) the involvement of the judiciary as the appointing and supervising authority.

As to the first of these questions (i), it is worth noting the total exclusion from the Ethics in Government target list of members of the Congress, of either party. If the underlying purpose of the special machinery is to reinforce both the actuality and the perception of an impartial, non-partisan investigation of specific allegations of wrongdoing within government, using that word in its broadest meaning, it may seem that a major loophole has been left uncovered. Perhaps the motives for doing so are not too difficult to comprehend. Just as a former Attorney General pointed to the excessive breadth of the net cast by some of the target categories, so too are the dimensions of the potential Congressional targets that are rendered immune from the guarantees of the special prosecutor's independence in executing his very broad powers.

Any list of predetermined special categories has innate weaknesses. The background to the United States law undoubtedly explains the reasons behind the specified targets of the special prosecutor legislation. In contemplating what approach should be taken to any similar initiative that might be taken by the Nova Scotia Department of Attorney General, special care will need to be directed to the Department's choice of target categories as to which a provincial office of special prosecutor would be expected to exercise jurisdiction. For my part, I am dubious as to the intrinsic merits of this kind of approach for the reasons stated above.

As to (ii), I recall the Australian experience which showed the ad hoc special prosecutors in that country, having been appointed under statutory authority to deal with extraordinary circumstances, recommending in their final reports the establishment of a permanent office of Director of Public Prosecutors with broad statutory powers to handle any future situation. The strong reservations expressed by United States critics to the creation of a permanent office of special

prosecutor have not been borne out by the Australian experience or in England and Wales where 100 years of history can be called upon to test the arguments advanced by American witnesses and quoted earlier in this opinion.

If precautions have to be taken against the possibility of seeing a permanent office of independent counsel used for the purposes of career advancement there are other alternative steps that can be taken to safeguard against such eventualities. Once again, the alternative models adopted in England and Australia can be invoked to counter the United States arguments rehearsed above. Ultimately, it is the personal calibre of the appointments made in the respective jurisdictions, and the public estimation of those appointed to the office of Special Prosecutor or D.P.P., which must carry the most persuasive weight in this debate.

In considering the final question (iii), *i.e.*, the desirability of involving the judiciary as the appointing and supervising authority, my personal estimation of the United States experience in this regard is entirely positive. In the prevailing political atmosphere of the United States, especially in the past two decades, I believe that former Attorney General Civiletti summed up the situation accurately when he declared: "In the end any constitutional challenge to the appointment mechanism will founder on one irrefutable fact... there is no good alternative." Looking at the list of special prosecutors who have been appointed under the Ethics in Government machinery by the Special Division of the District of Columbia Appeals Court, I can recall no instance in which serious, if any, questions have been raised as to the competence, independence or integrity of those individuals who have been chosen to carry out the duties of independent counsel. With this kind of appointments record on the part of the federal judiciary, a strong disposition to adhere to the *status quo* is inevitable.

We, in Canada, have become accustomed to the same general separation of executive and judicial functions in the area of prosecutions. This approach has recently been underlined in the latest amendments to the *Criminal Code*. Thus, whereas formerly s. 505(1)(c) authorized the court to approve the institution of criminal proceedings by a direct indictment preferred at the instance of a superior court judge, this power is no longer available. The same approach has seen the elimination of the former concurrent jurisdiction vested in the court and the Attorney General to prefer a direct indictment (former s. 505(1)(b)). The reluctance of the judiciary to become embroiled in this extraordinary kind of situation had been repeatedly expressed by the Bench and, presumably, a sigh of relief accompanied the news that the old s. 505 of the Code was repealed in 1985 (see c. 19, s. 113). Certain controlling functions are

still imposed upon the court in relation to the preferment of indictments in jury trials, where the prosecution is conducted by a prosecutor other than the Attorney General and in which the Attorney General has seen fit not to intervene in the proceedings. In these circumstances, a written order of a judge of the trial court is an essential prerequisite to the preferment of the indictment (see ss. 504 and 507 of the Code, S.C. 1985, c. 19, ss. 113, 115).

I believe that the basic separation of functions is soundly conceived and that any encroachment on the Attorney General's prerogative sphere of prosecutorial authority should be approached with the greatest circumspection. I am not disposed to see an absolute veto imposed by legislation on the kind of judicial involvement reflected in the U.S. federal law. Exceptional circumstances involving the need to demonstrate or renew public confidence in the administration of justice may demand resort to this exceptional procedure. Institutionalizing the appointment and supervision of special prosecutors by the judiciary, however, at whatever level and by whatever procedure, is not an option that I would intuitively invoke, notwithstanding its admitted record of success in the United States. As may already be becoming apparent, I lean towards the alternative model of a permanent Director of Public Prosecutions with statutory terms of appointment, independent authority and conditions of accountability.

4.8 Conclusions

(i) The office of Special Prosecutor in the federal law of the United States is generally thought to have originated with the Watergate affair in 1974-75. At the root of that memorable episode in American constitutional history was the objection voiced to the Department of Justice's accommodation of directions from President Nixon and his senior staff. In short, the fundamental criticism was directed against the Justice Department's failure to keep "partisan politics" and the "administration of justice" separate.

(ii) Plentiful as were the criticisms voiced during the post-Watergate period in the reports prepared by the Special Prosecution Force and the American Bar Association, there was no immediate consensus as to the reforms that should be introduced to overcome the core deficiencies in the pertinent institutions of government.

(iii) Within the U.S. Congress one of the earliest reform measures, entitled the Watergate Reorganization and Reform Bill, made provision for the appointment of a permanent special prosecutor who would have jurisdiction, independently of the Attorney General, to investigate and prosecute possible offences by the senior officials of

the Executive Branch from the President down to the Director of the F.B.I. A groundswell of opposition effectively killed the idea of a permanent office of Special Prosecutor. Compromises, supported by aspirants to the presidential office, failed to ensure that the Watergate Bill reached the statute book.

(iv) Congress was finally persuaded to enact legislation creating machinery for the appointment of ad hoc special prosecutors with assignments that were specific but of limited duration. This machinery is now incorporated in the *Ethics in Government Act* of 1978. The statute was amended in 1983 extending the sunset date to January 1988. Legislation to continue the procedures associated with the office of Special Prosecutor has not yet been enacted, leaving the present state of the law in some uncertainty. Another feature of the 1983 enactment was the replacement of the title "special prosecutor" with that of "independent counsel".

(v) In my analysis of the prevailing legislation I examine in turn:
(a) the "targets" of the independent counsel's investigations;
(b) the Attorney General's role in the preliminary investigation that must precede any involvement by the independent prosecutor;
(c) the role of the judicial panel in the District of Columbia which has jurisdiction to select and appoint the independent counsel, and also to define the scope of his investigation;
(d) the functions and powers of the independent counsel and the progress reports of his work that are required by the judicial panel;
(e) the tenure of office of the independent counsel and the grounds for his removal, including the role of the Attorney General in any removal proceedings.

(vi) A selection of views, incorporated into this opinion, are by some of the leading protagonists in the debate that continues to swirl around the question whether a permanent or temporary office of independent counsel is necessary in the U.S. federal system. There is nothing inherently exceptional in the federal office, to which so much public attention has been directed during and since the Watergate affair. Every State has general provisions, and from time to time resort is had locally to the expedient of appointing a special prosecutor to handle a difficult or sensitive investigation and prosecution. Many provinces of Canada have made similar resort to ad hoc appointments to meet a special set of circumstances.

(vii) A brief synopsis is given of the nature of the constitutionality question that has now been referred to the Supreme Court of the United States. It arises out of the challenges launched by Lt. Col.

Oliver North (of Iran-Contra notoriety) to the constitutional validity of the entire federal law governing the appointment of Lawrence E. Walsh, the independent counsel in that tangled web of intrigue. The dispute essentially boils down to defining the boundaries of the United States version of the separation of powers doctrine. In particular, the objection is registered to the *Ethics in Government Act* which removes the function of prosecuting crimes from the Executive branch (*i.e.*, from the Department of Justice) and lodges it in an individual (*i.e.*, the Special Prosecutor) who is neither appointed by nor removable by the President or the Attorney General.

(viii) The best statement in answer to these constitutional objections is that expressed by Benjamin R. Civiletti, himself a former Deputy Attorney General and former Attorney General of the United States. He observed: "In the end any constitutional challenge to the appointment mechanism will founder on one irrefutable fact - there is no good alternative. The concept of an independent counsel has become generally accepted because of a perception that the Attorney General, a presidentially appointed official, cannot always be relied upon to enforce the criminal law impartially against those in the highest offices of the Government." Having read the various opinions expressed by the leading constitutional authorities I expect to see the U.S. Supreme Court uphold the constitutionality of the independent counsel legislation. (see *ante*, footnote 8)

(ix) In the final section of the opinion I offer some personal observations, from a Canadian perspective, upon the main features of the United States federal law. I shall simply repeat here what I wrote in the previous section. Essentially, I believe that the basic separation of functions between the executive and judicial branches of government is soundly conceived, and that any encroachment on the Attorney General's prerogative sphere of prosecutorial authority should be approached with the greatest circumspection. I am not disposed, however, to see an absolute veto imposed by legislation on the kind of judicial involvement reflected in the U.S. federal law. Exceptional circumstances involving the need to demonstrate or renew public confidence in the administration of justice may demand resort to this exceptional procedure. Institutionalizing the appointment and supervision of Special Prosecutors by the judiciary, however, at whatever level and by whatever procedure, is not an option that I would intuitively invoke, notwithstanding its admitted record of success in the United States. As may already be apparent, I lean towards the alternative model of a permanent Director of Public Prosecutions with statutory terms of appointment, independent authority and conditions of accountability.

V
The Office of Director of Public Prosecutions - A Series of Alternative Approaches

5.1
Introduction

In my previous memoranda on this subject I traced the development of this important office in England and Wales and contrasted its present functions and powers, under the newly constituted Crown Prosecution Service, with the innovative changes introduced in Australia, at both federal and state levels, where several jurisdictions have seen fit in recent years to establish a statutory office of Director of Public Prosecutions. Another memorandum concentrated on the distinctive office of Special Prosecutor in the United States federal system, and reviewed the arguments that have been advanced in favour of ad hoc appointments to the office as contrasted with those that support the creation of a permanent office of Special Prosecutor (or Independent Counsel), whichever title best represents the ideals associated with that appointment.

In this opinion I propose, firstly, to review the experience of the many Commonwealth countries which, in the course of their negotiations with the United Kingdom government leading up to the granting of sovereignty, either insisted upon or were prevailed upon to accept as an integral part of their "independence" constitutions, the setting up of an office of Director of Public Prosecutions. These provisions set forth the status, powers and accountability of the office in a manner that is clearly designed to ensure that partisan political pressures are excluded from the country's machinery of prosecutions. Secondly, I will examine the situation in the Republic of Ireland which reflects a similar approach and where questions are now being asked as to the degree of accountability, if any, which attaches to that office. Comparisons will be made with the system now in place in Northern Ireland which bears many similarities to the situation in Nova Scotia. Thirdly, I propose to include a short description of the Scottish system in which the procurator fiscal (the local prosecutor), at least in theory, resembles the model we normally associate with the office of district attorney in the United States and whose authority extends to active involvement in the police investigation of crime. The final section will take a brief look at the system of prosecutions in New Zealand where, to all intents and purposes, the Solicitor General is the non-statutory Director of Public Prosecutions but with other functions as well in his capacity as the Attorney General's immediate subordinate in charge of both the civil and criminal sides of the Crown Law Office.

5.2
A constitutionally entrenched office of Director of Public Prosecutions - some Commonwealth precedents

The problem of avoiding political interference in the exercise of prosecutorial discretion, and at the same time recognizing the need to have regard to public interest considerations, has met with a variety of solutions in those Commonwealth jurisdictions which have gained their independence since World War II. Before looking at this veritable checker-board of alternative approaches it is necessary to explain at this point that in some countries the office of Attorney General is a public service appointment, contrary to the model familiar in the older Commonwealth countries such as Canada, Australia and New Zealand where the Attorney General is a politician in the sense of being an elected member of the legislature and a member of the Cabinet. I intend to devote the final opinion in this series to examining the range of issues that surround the office of Attorney General as we know it in Canada, federally and provincially. For the moment, however, I wish to recognize the existence, in some parts of the Commonwealth, of very different conceptions of the office that bears the same title of Attorney General. These instances generally identify the Attorney General with control over prosecutions to an extent that in other jurisdictions is exercised by the Director of Public Prosecutions. And it is with this specific topic that we are presently concerned.

To avoid the confusion that might result from wending our way through the thicket of pertinent constitutional measures I propose to rely upon a discussion paper that I prepared in 1977 for the meeting of Commonwealth Law Ministers held in Winnipeg. That document, entitled "Emerging problems in defining the modern role of the office of Attorney General in Commonwealth countries," identified at least six separate models from the array of constitutional instruments. They can be summarized as follows:

Model No. 1

Where the Attorney General is a public servant, combines with his office the functions of a Director of Public Prosecutions and is not subject to the directions or control of any other person or authority.

Countries exemplifying this model include Kenya, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Botswana and the Seychelles.[9]

Model No. 2

The Attorney General is a political appointment. He is a member of the Government but, although holding ministerial office, he does not sit regularly as a member of the Cabinet. Alone of all the

9. Bahamas, Trinidad and Tobago, and Sierra Leone have been omitted from the original list because of changes to their respective constitutions since the paper was written.

Commonwealth countries, strangely enough, the Attorney General of England and Wales typifies this particular category.[10]

10. The reasons for his exclusion from the Cabinet, which date back to 1928, have been fully elaborated in my earlier study of "The Law Officers of the Crown" (1964).

Model No. 3

The Attorney General is a member of the Government and, as such, is normally included within the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of Attorney General is combined with the portfolio of Minister of Justice (or similar title).

Most of the Canadian provinces and the Federal Government have adopted this model. Other countries that fall within this category include Australia (both the States and the Commonwealth Government), Nigeria and Ghana.

Where, in these jurisdictions, there exists a Director of Public Prosecutions (or its equivalent) the Director is, in the ultimate analysis, subject to the direction and control of the Attorney General. How frequently such direction is exercised is a separate study but worthy of attention in the context of explaining the theory and practice of individual countries.

Model No. 4

The Director of Public Prosecutions is a public servant, who is not subject to the direction or control of any other person or authority.

This model will be recognized as the classic Commonwealth Office pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many of the countries represented at the present meeting. Following independence, in many instances this particular provision was changed to bring the D.P.P. under the direct control of the Attorney General. Jamaica and Guyana, however, have retained the total independence of the office of Director of Public Prosecutions.

Model No. 5

The Director of Public Prosecutions is a public servant. In the exercise of his powers he is subject to the directions of the President but no other person.

This is the situation that exists in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966.

Model No. 6

The Director of Public Prosecutions is a public servant. Generally, the D.P.P. is not subject to control by any other person but if, in his judgment, a case involves general considerations of public policy the Director of Public Prosecutions must bring the case to the attention of the Attorney General who is then empowered to give directions to the Director.

This model is applicable in Zambia alone at present. In Malawi, it is of interest to note, the Director of Public Prosecutions is subject to the directions of the Attorney General. If however, the Attorney General is a public servant, the Minister responsible for the administration of justice may require any case, or class of cases, to be submitted to him for directions as to the institution or discontinuance of criminal proceedings. (See Minutes of Meeting and Memoranda, 1977, Commonwealth Secretariat, pp. 196-204.)

In the context of my present discussion I intend to confine my attention to the last three of the above models by way of amplification of the summaries quoted above.

Model No. 4 : the Totally Independent Director of Public Prosecutions

Having recently visited Jamaica, I can confirm the reality of the above definition of a "totally independent Director of Public Prosecutions". To grasp the full significance of this model we need to look at the Jamaican Constitution, s. 94 of which reads as follows:

"(1) There shall be a Director of Public Prosecutions, whose office shall be a public office.

(2) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a Judge of the Supreme Court.

(3) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do--
(a) to institute and undertake criminal proceedings against any person before any court other than a court-martial in respect of any offence against the law of Jamaica;
(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(4) The powers of the Director of Public Prosecutions under Subsection (3) of this section may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

(5) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of Subsection (3) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(6) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

It is significant that the three most recent holders of the office of D.P.P. in Jamaica have been elevated to that country's Court of Appeal, thus manifesting the personal qualities and qualifications of the individual appointees. Another point of importance, which we have seen also reflected in the Australian approach, is the entrenched provision in the Jamaica Constitution (s.96) that confers upon the D.P.P. security of tenure equivalent to that of a Supreme Court judge. The same protection is to be found in the Constitutions of Guyana (art. 225), Zambia (art. 59), and Sierra Leone (art. 97). During my recent visit to Jamaica I sensed a feeling of widespread satisfaction among different segments of the society and members of the main political parties with the independence exhibited by the successive D.P.P.'s in discharging their constitutional functions. A further point of interest was the disclosure by Mr. Carl Rattray, a former Attorney General and almost the last surviving member of the constitutional delegation that negotiated Jamaica's independence Constitution, that it was at the insistence of Mr. Michael Manley and Mr. Alexander Bustamante (the then leaders of the main political parties) that the above Section 94 was inserted as a vital part of the new Constitution.

Model No.5 : the Tanzanian approach

The extraordinary condition, referred to in my 1977 paper to the Commonwealth Law Ministers, whereby the D.P.P. is "subject to the directions of the President but no other person", is contained in the Criminal Procedure Code of Tanzania (s. 80A (5)), not in the Constitution. To understand its full legal import it would be necessary to gain an appreciation of the role played by President Nyerere during the 26 years of that country's independence, and that I do not propose to engage in here. I have inserted it as an illustration of the extreme position that can be taken by any jurisdiction that is truly a sovereign nation.

Model No. 6 : an Independent Director of Public Prosecutions but with some constraints

Later on, we shall see how in the Republic of Ireland certain exceptional offences involving national security are reserved to the Attorney General's ultimate authority, notwithstanding the otherwise total transfer of the Attorney General's prosecuting functions to the Director of Public Prosecutions. A variation on this kind of approach is to be found in the Zambian Constitution. The basic provision relating to the office of D.P.P. replicates those in the Jamaican and other independence Constitutions wherein the Director of Public Prosecutions, in the exercise of the powers conferred upon him by the Constitution, is said not to be subject to the direction or control of any other person or authority. The constraints on this unlimited authority is contained in Article 58(7) of the Zambia Constitution which declares:

"Provided that where the exercise of any such power in any case may, in the judgment of the Director, involve general considerations of public policy the Director shall bring the case to the notice of the Attorney General and shall, in the exercise of his powers in relation to that case, act in accordance with any directions of the Attorney General."

Barbados has similarly introduced several categories of offences that are outside the exclusive domain of the otherwise independent Director of Public Prosecutions. This policy took effect when the original Constitution, enacted in 1966, was amended in 1974. The present law enables the Attorney General of Barbados to give general or specific directions to the Director of Public Prosecutions as to the powers conferred on the latter officer, who is required to act in accordance with such directions in the case of offences relating to piracy; trading or otherwise dealing in slaves (a strange type of

provision in this day and age); foreign enlistment; publications calculated to interfere with the peaceful relations of Barbados with foreign states; treason, misprision of treason, treason felony or treachery; sedition or seditious meetings, official secrets, mutiny or incitement to mutiny; unlawful oaths; and any offence under an enactment relating to any right or obligation of Barbados under international law (*op. cit.*, s. 15).

Another jurisdiction in the Caribbean, *viz.*, Trinidad and Tobago, has moved to transform its original provisions pertaining to the control of prosecutions within its boundaries. Thus, whereas under the independence Constitution of 1962 the Attorney General was given power "in any case in which he considers it desirable so to do to institute and undertake legal proceedings against any person before any court", that country's 1976 Republican Constitution (s. 90(2) of the Schedule to the Constitution) makes provision for a Director of Public Prosecutions to operate separately from the Attorney General who is "charged with the administration of legal affairs" in the country. When I visited Trinidad and Tobago there was uncertainty among the principals involved in exactly determining the boundary lines in the language of the constitution. However much care is taken in the formulation of the powers associated with the respective offices, there is little doubt that the experience, standing and personalities of the people occupying these positions, as well as that of other members of the executive branch, have to be carefully assessed if a realistic picture is to be gained of the day to day administration of justice. What is important to determine is the extent to which the insertion of the D.P.P.'s office into the constitution fundamentally changes both the perception and the actuality of the Director's independence.

It is impossible, in a memorandum of this kind, to accord a comparative analysis of the D.P.P.'s office its proper desserts. A herculean effort would be required to simply trace the constitutional changes that have taken place in each jurisdiction since the discussions of principle that usually accompanied the customary pre-independence negotiations. Accordingly, I shall confine myself to just one further illustration. In the federal Constitution of Nigeria, promulgated in 1960 (S.I. 1960/1952) the classic Westminster model of an independent Director of Public Prosecutions is to be found. Thus, it is stated that "in the exercise of the powers conferred upon him the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority". In the earliest years after independence questions were raised from time to time in the federal Legislative Assembly inquiring about this, that or the other prosecution decision. The inquiries were addressed to the federal Attorney General and Minister of Justice who was compelled

to deflect the search for information by undertaking to ascertain the facts from the public official concerned, *i.e.*, the D.P.P. The first Attorney General in the newly independent Nigeria was Dr. T.O. Elias who subsequently became, in turn, the Chief Justice of Nigeria and, later, President of the International Court of Justice in The Hague. I vividly recall Dr. Elias describing to me in 1967 the frustrations he was experiencing in securing the basic information that he needed to reply to his questioners in the Legislative Assembly. The final straw came when the D.P.P. not only declined to assist the Minister but escorted Dr. Elias to the door with the comment that under the Nigerian Constitution he was not obliged to account to the Minister of Justice and Attorney General for his actions. Subsequently, an amendment to the Constitution was introduced and passed, rendering the D.P.P. subject to the Attorney General and establishing the Director's accountability for his decisions.

Such a step had been forecast by at least one of the State Premiers who was part of the constitutional team for Nigeria that negotiated independence in 1960. The Colonial Secretary (Mr. Ian MacLeod), relying on the advice of Sir Kenneth Roberts Wray (then Legal Adviser to the Colonial Office), insisted on the insertion of the clause securing an independent office of D.P.P. And so it appeared in the first Constitution. But the present day Constitution of Nigeria (the latest in a series of major revisions that have generally accompanied a military coup d'état) is totally silent on the office of Director of Public Prosecutions. The Nigerian experience must not be taken as necessarily reflective of the position in other countries which, either voluntarily or by the force of circumstances, adopted the classic Commonwealth office model (my Model No. 4). What this short review, I hope, will have accomplished is to raise serious questions as to the effectiveness of any such definition of the D.P.P.'s authority when placed alongside the constitutional doctrine of ministerial accountability. I shall have more to say on this critical question in my final opinion.

5.3 Differences in the approaches of the Republic of Ireland and Northern Ireland towards defining the role and independence of the Director of Public Prosecutions

Unlike the examples reviewed in the previous section of this opinion, in which the D.P.P.'s office is accorded constitutional recognition, the Irish Republic's move in 1974 to create its own office of Director of Public Prosecutions was by the ordinary legislative route (see Statute No. 22 of 1974). Note should be taken at the outset of this discussion that the office of Attorney General of Ireland had existed for many centuries prior to the achieving of independence in 1920. Moreover, the 1920 Constitution of the Republic of Ireland formally recognizes the Attorney General's status as one of the great offices of State, in declaring (Article 30.1):

"There shall be an Attorney General who shall be the adviser of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or enforced on him by this Constitution or by law."

Before turning to the fundamental changes effectuated in 1974 there are two other relevant provisions contained in the Constitution which need to be borne in mind. Article 30.3 states that:

"...all crimes and offences prosecuted in any court... other than a court of summary jurisdiction shall be prosecuted in the name of the People at the suit of the Attorney General or some other person authorized in accordance with law to act for that purpose."

The immediate ensuing provision declares that "the Attorney General shall not be a member of the Government", thereby manifesting the intention of the framers of the original Republican Constitution that the Attorney General's office should be distanced from the other members of the executive branch of government.[11]

Apart from certain exceptional offences with respect to which the Attorney General's ultimate authority remains intact, a subject already touched upon earlier in this opinion, the *Prosecution of Offences Act 1974* has effectively transferred the whole of the Attorney General's prosecuting functions to the newly created Director of Public Prosecutions. Under that enactment the Director is empowered "to perform all the functions capable of being performed in relation to criminal matters... by the Attorney General" (*op. cit.*, s. 3(1)). These duties include the exclusive right to prosecute an indictment and to enter a *nolle prosequi*. One important limitation is the provision that reserves to the Government, if it is of the opinion that it is expedient to do so in the interests of national security, the power to transfer functions in criminal matters back to the Attorney General (*op. cit.*, s.5 (1)).

11. For the fullest account of this historical office in Ireland reference should be made to Professor J.P. Casey's book "The Office of the Attorney General in Ireland" (1980, Dublin).

Uppermost in the minds of those who prompted the introduction of the Prosecution of Offences Bill in the Irish Parliament in 1974 would appear to be the principle now embodied in the ensuing enactment. Section 2 (5) of the Act states quite simply: "The Director shall be independent in the performance of his functions". Other provisions that underscore the D.P.P.'s special status in the Republic of Ireland include the composition of the appointments committee that is charged with the responsibility of recommending to the Prime Minister of the day the most suitable appointee. The committee is made up of the Chief Justice, the Chairman of the Bar Council, the President of the Incorporated Law Society and the Secretary to the Government (*op. cit.*, s. 2 (7)). Added protection to the Director's independence is provided by way of the procedure to be followed should the removal of an incumbent become a pressing matter. It necessitates prior consideration on the part of the Government of a report by a committee consisting, in this instance, of the Chief Justice, a Judge of the High Court and the Attorney General (*op. cit.*, s. 2 (9)). Yet another protective device which, so far as I can recall, is indigenous to Ireland is the prohibition against the submission of certain communications addressed to the D.P.P., or a member of his staff, for the purpose of influencing a decision in relation to pending criminal proceedings (*op. cit.*, s. 6 (1)(a)).

In my memorandum analyzing the various Australian statutes pertaining to the office of D.P.P. it will be recalled that one of the requirements, common to all the enactments, imposed an obligation on both the Attorney General and the Director of Public Prosecutions to consult with the other official when requested to do so with respect to matters concerning the exercise of the Director's powers. This might seem, at first glance, to be a superfluous provision but within it lies the potential for protection against rash or ill-considered initiatives. The earliest precedent that I have come across for the principle embodied in the various Australian statutes is to be found in the Irish *Prosecution of Offences Act, 1974*, s. 2 (6) which declares that the Attorney General and the Director "shall consult together from time to time in relation to matters pertaining to the functions of the Director [of Public Prosecution]". Admirable as the principle of consultation must be in defining the relationship between the two highest officials of the state upon whom the immense powers of prosecution are imposed, the bedrock question remains, whose authority is to prevail where the consultation produces no agreement?

The Irish statute itself provides no answer to this question but the intention behind the above-quoted provision is revealed in the explanatory memorandum issued by the Department of the Prime Minister when making public the terms of the 1974 Bill. It stated:

"The provision for consultation would not confer on the Attorney General any right to give directions to the Director [of Public Prosecutions] as to how he will perform his functions in relation either to particular cases or generally" (quoted in Casey, *op. cit.*, p. 227, fn. 12). This philosophy is more consistent with those constitutional provisions discussed earlier in reference to some of the newly independent Commonwealth countries. There, it may be recalled, the British Commonwealth Office favoured the principle wherein the D.P.P., in exercising his discretionary powers, was "not to be subject to the direction or control of any other person or authority". In any assessment of the wisdom of conferring such unlimited discretionary authority upon a public official it needs to be remembered that only a few of the countries that incorporated this kind of provision into their original constitutions have persisted in adhering to its viability.

Whether these changes were known to the Government of the Irish Republic as it contemplated the introduction of the *Prosecution of Offences Act, 1974*, may never be known. The express adoption of the concept of a truly independent office of Director of Public Prosecutions is, however, in marked contrast to the corresponding position in England and Wales and that which obtains in Northern Ireland.

A few words about the Northern Ireland office of D.P.P. may be helpful at this juncture, especially in view of the basic similarities in the problems encountered in Nova Scotia and in Ulster relating to the relationship between police and prosecutors in terms of exercising control over investigations and the decision to lay informations.[12] In particular, I trace the pre-direct rule initiatives of the Stormont Parliament in establishing, for the first time in Ulster's history, a new Department of Public Prosecutions headed by a D.P.P. (*op. cit.*, pp. 246-249). From there I move on to the statutory Order in Council, enacted following the assumption of direct rule by the Westminster Parliament in 1972, and which, *inter alia*, define the relationship of the D.P.P. in Northern Ireland to his political superior, the Attorney General of England, Wales and Northern Ireland. Entitled the Prosecution of Offences (Northern Ireland) Order 1972 (S.I. 1972, No. 538 (N.I.)) the emergency instrument states that the Director of Public Prosecutions "shall discharge his functions under the superintendence of the Attorney General and shall be subject to the directions of the Attorney General in all matters...". This formulation of the relationship exactly mirrors the statutory language which, since 1879, has described the constitutional position of the English D.P.P. It should be compared with the terms of the Bill that was being debated in the Northern Ireland Parliament before the imposition of direct rule in 1972. In that measure, the Prosecution of Offences Bill

12. I have examined these issues, as they have emerged in Northern Ireland, in my book "The Attorney General, Politics and the Public Interest", pp. 236-262, to which your attention is drawn.

(N.I.), the Director was to be responsible to the Attorney General of the Province "for the due performance of his functions under the Act" (Bill no. 26, 1972, Clause 2 (2)).

I intend, at the conclusion of this exercise, to review the alternative formulae used in various jurisdictions to capture the constitutional dimensions of the inter-relationship between these two central positions at the pinnacle of the prosecution system. For the moment, I shall content myself with making two further observations on the prevailing legislation that obtains so far as Northern Ireland is concerned. In a speech to the House of Commons introducing the Emergency Order the then Attorney General, Sir Peter (now Lord) Rawlinson, emphasized that "during the currency of [the present emergency] the Director in Northern Ireland shall discharge his functions under my superintendence and shall be subject to my directions in all matters. This arises from my new role as Attorney General for Northern Ireland and my answerability to this House in Westminster. I shall have superintendence, as I have in England and Wales, but the day-to-day conduct will be that of the Director "(H.C. Deb., Vol. 836, col. 1059, May 9, 1972). To reinforce the supreme authority of the Attorney General, Section 34 (2) of the *Northern Ireland Constitution Act, 1973* confers upon the Attorney General the power of appointing the Director and his deputy and, more importantly, the authority to remove either of the officials on the grounds of inability or misbehaviour.

Students of Irish constitutional history will be aware of the common bonds that existed in both parts of Ireland prior to achieving independence in 1920 so far as the role and functions of the Attorney General were concerned. Despite the division reflected in the *Government of Ireland Act, 1920*, the prosecution system continued unchanged in the North and in the South. Changes began to become apparent in the new Republic of Ireland when the *Ministers and Secretaries Act, 1924* (Statute No. 16 of 1924, s.6) ordained that "The Attorney General may be or become a member of the Dâil Eireann [the Irish Parliament]", a provision that absolves any holder of that office from any legal obligation to secure a seat in the Legislative Assembly. In the period since Irish independence only six holders of the office of Attorney General have been elected as deputies in the Dâil. This is in marked contrast to the law and practice in the Northern Ireland system of devolutionary government.

Notwithstanding the absence of any condition that the Attorney General of the Republic of Ireland be appointed from the ranks of the elected representatives the office is regarded as a political appointment made by the Prime Minister, and the incumbent retires from that appointment when there is a change of Administration (Constitution, Art. 5 (4)). The apparent inconsistency displayed by

Art. 30.4 of the same Constitution, which states that "the Attorney General shall not be a member of the Government", is explained by the convention that the Attorney General is not included as a member of the Cabinet (see Casey, *op. cit.*, pp. 45-46). According to the same author, politicians and judges alike view the office of Attorney General as embodying the same features of independence in the discharge of his constitutional duties as those associated with the English Attorney General (*op cit.*, pp. 39-44, 49-51).

In looking for pointers as to the application of the doctrine of ministerial accountability to activities of the D.P.P. in the Irish Republic, the constitutional picture is far from being crystal clear. On the second reading of the Bill that created the office in 1974, it was categorically stated by the Parliamentary Secretary to the Prime Minister that it was not intended that the Director of Public Prosecutions should be accountable to the Attorney General. Other provisions in the legislation, quoted earlier in this section, appear to corroborate that interpretation. To these arguments should be added the provision in the current standing orders of the Dâil Eireann that, even if the Attorney General is a member of the Lower House, he cannot be questioned as to his actions (S.O. 32 of 1974). As best as I can explain this surprising provision, the standing orders require that questions be addressed only to a "member of the Government", which by the express terms of the Constitution excludes the Attorney General. As Casey describes the "curious half-world" in which the Irish Attorney General finds himself, "a political appointee, privy to government secrets and possibly a parliamentary spokesman for government, he is virtually indistinguishable from a minister. Yet unlike ministers he is not personally answerable to Parliament for the way he discharges his functions" (*op. cit.*, p. 71). On the infrequent occasions when deputies have put down questions about prosecutions the Prime Minister, or his Parliamentary Secretary, has responded even though the Attorney General himself may have been present in the Dâil and able to explain or defend his actions.[13]

Who then, it may be asked, is the member of the executive branch of government who is accountable to the Irish Parliament for decisions made by its Director of Public Prosecutions? Since I have attempted elsewhere to answer this imponderable question I shall recapitulate what I wrote in my 1984 book. As I saw the problem a few years ago:

"...it is pertinent to bear in mind that whereas the principle of independence is given express recognition, thus investing the Director with the last word as to prosecutions and protecting his office from any political control or direction, the question of accountability to Parliament is by no means necessarily foreclosed.

13. See, e.g., 85 Dâil Debates, col. 1025-29, December 3, 1941; 136 Dâil Debates, col. 921, February 12, 1953, and Edwards, *op. cit.*, p. 267, fn. 47.

Normally, the two concepts, accountability and control, go hand in hand but in the exceptional situation that prevails under Irish constitutional law we may assume that the Prime Minister will answer for the D.P.P.'s actions in the same fashion as that which obtains with respect to questions concerning decisions by the Attorney General. Strong support for this conclusion is contained in Section 1 (i) of the Ministers and Secretaries Act 1924 *which assigns to the Department of the President of the Executive Council (i.e., the Prime Minister) 'the administrative control and responsibility for such public services and the business, powers, duties and functions thereof as may not for the time being be comprised in any of the Departments of State constituted by this Act'."* (*op. cit.*, p. 268, fn. 48)

I concluded with this comment:

"If the experience of other Commonwealth countries, which have adopted into their constitutions a similar model of an unaccountable public prosecutor, is any pointer to what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected Parliament for intense debate. Among the most interested observers will be the members of the United Kingdom Parliament whose commitment to the constitutional doctrine of ministerial responsibility has always extended to include the Attorney General and his subordinate colleague, the Director of Public Prosecutions. No student of Northern Ireland's parliamentary history can doubt its adherence to the same principles. Some notable examples of its application were dealt with earlier in this chapter. That said, it would nonetheless be unrealistic to fail to recognize the limitations, evident in Stormont and Westminster, in making the principle of accountability convincing and dependable." (loc. cit.)

Declan Costello, an Irish reviewer of my book "The Attorney General, Politics and the Public Interest", writing in "The Irish Jurist", described the statutory differences that I have noted in this opinion as a reflection of

"two distinct and indeed incompatible constitutional theories, one of which holds that the Attorney General should have ultimate ministerial responsibility to Parliament for all prosecutorial decisions (the received wisdom in English constitutional law) and the other which adopts the concept of an independent public

prosecutor and the view that this concept should prevail over that of an accountable public prosecutor." (Vol. XX, 1985, p. 223)

Given the identification of the Canadian version of the office of Attorney General, both federally and provincially, as a direct descendant of, and adherent to, the English constitutional model (albeit with some modifications) the informed views of the same reviewer explaining the rationale for the Irish approach are worth quoting. Declan Costello writes:

"The latter theory [i.e., the independent as opposed to the accountable public prosecutor] was given statutory embodiment in this country in the Prosecution of Offences Act, 1974. *But it had existed in practice for some considerable time. Indeed, the theory that the Attorney should be ultimately responsible to Parliament for all prosecutorial decisions never took hold in the State having been fatally weakened by the* Ministers and Secretaries Act, 1924 *which, contrary to pre-1922 constitutional convention, no longer required that the Attorney be a member of Parliament. Not only was it the exception for the Attorney to be a member of the Dâil but there developed a general acceptance of the view that it was not fair to suspects or to accused persons that decisions not to prosecute or to withdraw pending prosecutions should be publicly explained or be subject to public debate. These developments together with a widely held conviction that the prosecutorial process should be seen to be insulated from party political considerations meant that when the Director's role came to be established the Oireachtas [the Prime Minister] emphatically supported the concept of his complete independence.*
Professor Edwards' comparative survey of the constitutional role of Attorneys General and Directors of Public Prosecutions leads him, somewhat minatorily, to suggest that if the experience in other countries who have adopted the concept of an unaccountable public prosecutor "is any pointer to what lies in store for the Republic of Ireland it is only a matter of time before the fundamental questions of control and accountability force themselves before its elected parliament for intense debate". This prophecy may of course be fulfilled but, in the meantime, it is fair to say that the absence of public debate on the Director's role over the past twelve years, together with pre-1974 attitudes to the Attorney's independence, would suggest a general satisfaction with the operation of the constitutional principle which this country has adopted." (loc. cit.)

When this Commission has to consider its findings and recommendations, careful attention will have to be given to the

opposing views expressed in the above extended extracts. Reference was later made, by the same reviewer, to the D.P.P.'s accountability under Irish law to the courts, if not to Parliament. Viewed in a Canadian context, and in the light of the major impact which the Charter of Rights and Freedoms has made in interpreting Canadian constitutional law, including the scope of judicial review of decisions by the Attorney General and his agents, this important question must be deferred to my examination of the future role of the office of Attorney General in Nova Scotia which will be the subject of my next memorandum.

5.4 The role of the Lord Advocate and the Procurator Fiscal in Scottish criminal investigations and prosecutions

As I read the various files derived from the Department of Attorney General and the RCMP with reference to the Thornhill and MacLean investigations, in which the definition of the respective roles of the police and prosecutors is sometimes categorically expressed, I found myself wondering whether, for example, the former Deputy Attorney General [Gordon Coles] had in mind as his model the Scottish integrated system of criminal prosecutions in which the police act under the direct superintendence of the procurators fiscal. Whether that supposition is likely to be confirmed or not there is good reason to gain a better understanding of the role of the Lord Advocate and the Crown Office in Scotland. It is undeniable that amongst the pressures exerted in England, leading up to the creation of the Crown Prosecution Service, was the admiration expressed in recent times by such diverse bodies as "Justice" (the British section of the International Commission of Jurists), the House of Commons Select Committee on Home Affairs, the Inns of Court Conservative Lawyers Association and the MacDermott Committee in Northern Ireland which, in their respective reports, recommended the adoption of the Scottish procurator fiscal's overall responsibilities for the investigatory and prosecutorial functions in crime (see Edwards, *op. cit.*, p. 270 for the appropriate references).

Just as the Attorney General in Nova Scotia formerly was responsible for both the policing and prosecutorial functions in the province so, too, for many centuries the Lord Advocate has embodied both dimensions of law enforcement in Scottish criminal law. There is no need here to trace the historical origins and evolution of the office of Lord Advocate. It can be traced back to the 15th century (see Edwards, *op. cit.*, pp. 270 - 275). Echoes of the Lord Advocate's former glory are to be seen reflected in the precedence accorded the office holder over all the Scottish judges including the Lord Justice Clerk (the second highest judicial officer) and excepting only the Lord President of the Court of Session. Although generally viewed as the Scottish equivalent of the English

Law Officers, it has by no means been universally expected that appointees to the positions of Lord Advocate and the Solicitor General for Scotland should be serving members of Parliament. This, however, should not be construed as manifesting a disposition to regard the offices as public service appointments. Sometimes the appointees have sat in the House of Lords, the most recent illustration of this practice being Lord MacKay of Clashfern, the present Lord Chancellor, who had previously occupied the post of Lord Advocate (see Edwards, *op. cit.*, pp. 283-284).

Because of the geographical difficulties involved, the Crown Office in Edinburgh and the Lord Advocate's Chambers in London constitute the administrative base from which the Lord Advocate discharges his ministerial duties and those associated with his position as head of the criminal prosecutions department in Scotland. In the latter regard it is the Crown Agent, a position traceable back to the late 18th century, who heads the professional staff responsible for ensuring the smooth running of the machinery of prosecutions. Prior to 1945 the Crown Agent held his appointment at the pleasure of the senior Scottish Law Officer of the Crown, moving in and out of office in concert with the political future of the Lord Advocate. Presently, the appointment of Crown Agent is seen as a senior position in the Scottish civil service but the incumbent is likely to be drawn from the ranks of the experienced line prosecutors, better known by their ancient title of procurators fiscal. They represent the Lord Advocate in the same way that, in Canada, the Crown Attorneys or Crown Prosecutors act as agents of the Attorney General.

Another title requiring explanation is that of the dozen or so part time advocates depute who are appointed from the ranks of the Scottish Bar and act as Crown counsel in the more difficult or important cases that are tried in the superior courts. Instructions to the full time procurators fiscal emanate from one or other of the advocates depute operating out of the Crown Office. Only in circumstances where the case is one of exceptional importance or difficulty would either the Lord Advocate or the Solicitor General expect to become personally involved. One further word about the position of the advocates depute. No longer, since 1970, is this appointment viewed as requiring the affiliation of the appointee with the political party in power. This change has had the desirable effect of introducing a measure of continuity in the discretionary guidelines handed down by the Crown Office.

The importance of this change becomes apparent when it is understood that reports on criminal cases being investigated by the police, under the superintendence of the fiscals, are regularly submitted to the Crown Office for directions by the advocate depute

who is assigned to the particular file. The precise circumstances for such referrals will be spelt out later. It is the advocate depute, not the procurator fiscal, who decides whether proceedings should be instituted, on what charges, and whether the case should be dealt with summarily or by indictment. This degree of centralization would seem to even overshadow that exhibited in the files as the practice followed in the Nova Scotia Department of Attorney General. An accused person, in Scotland, has no right to elect trial by jury. That decision, also, is at the discretion of the Crown Office. There the advocate depute in charge of the case will decide if trial by indictment is in order and, if so, whether to proceed before a sheriff and jury, where the maximum sentence is two years imprisonment, or before the High Court of Justiciary. In the latter situation the advocate depute will represent the Crown unless, as indicated earlier, the circumstances are so exceptional that one of the Law Officers will take charge of the prosecution.[14]

What has just been described should not be read as implying the absence of any discretionary authority on the part of the procurator fiscal. Even with the advent of the Crown Prosecution Service in England and Wales the hallmark that still distinguishes the Scottish procurator fiscal from his English counterpart, the Crown prosecutor, is the former official's supervisory responsibilities for the investigation of crime. The roots of this role are steeped in the history of the Scottish fiscal going back to the 18th century. Nowadays, under a set of directives issued in the name of the Lord Advocate, the following categories of cases must be referred to the Crown Office by every fiscal:

"...first, where there is doubt as to whether proceedings should be instituted or not; secondly, if there is any question of principle or importance which is raised; thirdly, any case which is serious enough to justify being tried on indictment and, finally, in a serious case where an accused offers a plea of guilty to a lesser charge than that on which he has been indicted. In addition, if experience suggests the advisability of constituting any new directives these will be circulated in the form of a Crown Office circular, bearing the full authority of the Lord Advocate. Where there are no formal instructions to the contrary the procurator fiscal is left to the best exercise of his own judgment, no doubt acting in consultation with his colleagues in those large districts which require a fraternity of fiscals to discharge the multiple duties of that office. Even so, the procurator fiscal's decision may be challenged and brought to the attention of the Crown Office and there reviewed by one of the advocates depute.... In short, whilst the procurator fiscal has undoubted discretionary powers his discretion is limited and

14. For the citation of the relevant authorities in support of this summary of Scottish criminal procedure, see Edwards, *op. cit.*, pp. 294-296.

conditional, the ultimate authority residing in the Lord Advocate and his representatives sitting in the Crown Office in Edinburgh." (Edwards, *op. cit.*, p. 298)

Turning next to the troublesome questions, at least so far as the evidence adduced before this Royal Commission would suggest, surrounding the ultimate authority as between the police and the prosecuting authorities with respect to laying an information, Scottish law and practice is clear. The longstanding relationship of the procurator fiscal to the police, in his sphere of local jurisdiction, was given statutory expression in the *Police (Scotland) Act, 1967*, s. 17 of which provides that "in relation to the investigation of offences the Chief Constable [*ergo* every other police constable in that force] shall comply with such lawful instructions as he may receive from the appropriate prosecutor" (1967, c. 77). All serious offences committed within the prosecutor's jurisdiction must be reported by the police to the procurator fiscal's office.

Subsequent control of the ensuing police investigation and the allocation of resources, the engaging of forensic or other experts through to the interrogation, if necessary, of witnesses, and decisions as to whether or not to oppose bail, are all regarded as falling within the fiscal's bailiwick, not the police. Above all, it is the procurator fiscal, not the local chief of police, who decides whether the evidence justifies the launching of a criminal prosecution. This relationship, moreover, is in no way qualified by any later decisions taken by one of the advocates depute in the Crown Office, amending or overruling the initial course of action decided upon by the local procurator fiscal. If one fundamental difference between Canadian and Scottish constitutional principles is to be singled out for emphasis in this review of the Scottish system of policing and prosecuting, it would have to be the ultimate authority of the prosecutor (be it the local fiscal or the Crown Office representing the Lord Advocate) to decide if and when the criminal process is set in motion by the laying of the charge.

The private prosecutor in Scottish law is another phenomenon that rarely exhibits itself. Unlike English and Canadian law which specifically recognize the right of a private citizen to launch criminal proceedings, if he can satisfy a Justice of the Peace that there are reasonable and probable grounds in support of his allegation that a criminal offence has been committed, the private prosecutor in Scotland faces immense obstacles to his invoking the criminal law on his own volition. Writing in 1938 a famous Scottish Lord of Appeal, Lord Normand concluded: "It may safely be said that private prosecution either before the High Court of Justiciary or before the Sheriff Courts...is virtually unknown, and is of little more than

antiquarian interest" ((1938) 54 L.Q.R. 345 at p. 349). Scottish criminal procedure permits a private individual, who has been unable to persuade the Crown, in the person of the Lord Advocate or his representative, to institute criminal proceedings, to leapfrog directly into the High Court of Justiciary and to make application for the issuance of "criminal letters" authorizing the citizen to conduct the prosecution in his own right.

Prior to 1982 only one such application for a private prosecution had been successful and that was in 1909 in the case of [1909] *J.& P. Coats Ltd.* v. *Brown* (S.C.(J.) 29). On that occasion the Lord Advocate stated that his objections to authorizing criminal proceedings were based on the improbability of a conviction being secured. Nevertheless, he acknowledged that he was not supreme in this matter and quoted the well known passage in Baron Hume's "Commentaries on the Law of Scotland" ((1844) Vol. II, p. 118): "The Lord Advocate is not absolute and unaccountable on these occasions". Continuing, the senior Scottish Law Officer acknowledged:

"I cannot deny that the right of private prosecution still remains in the criminal law of Scotland, although very seldom availed of - never, so far as I am aware, during the last 200 or 300 years - ...Unless in very exceptional and unusual circumstances, the Court might probably think that they ought not to override my discretionary powers; but...if it can be shown that I have failed in my public duty, if it can be shown that I have acted in this matter corruptly, oppressively, or wantonly I do not deny that there is a remedy open to the complainers and there ought to be."

I have examined the scant authorities on this subject elsewhere, including the unenthusiastic endorsement of the *status quo* as recently as 1975 by an inter-departmental committee, under the chairmanship of Lord Thompson, which recommended that in no circumstances should the Lord Advocate or public prosecutor be required to concur in a private prosecution (Cmnd. 6218, H.M.S.O., Edinburgh, 1975 at p. 122).

The dangers of formulating such an unqualified recommendation were made abundantly evident only a few years later in the revelations that surfaced in the House of Commons as to the handling of the notorious Glasgow rape case (see *X.* v. *Sweeney et al.*, 1982, S.C.C.R. 161) by the Scottish prosecuting authorities. After reviewing at length the chronology of events in that case I concluded: "No clearer indication could be sought of the healthy existence in Scottish law of the residual right of private prosecution, and with it a reaffirmation of the need to preserve intact for

exceptional cases the constitutional right of the ordinary citizen to such judicial redress by way of criminal letters when otherwise justice would be denied" (Edwards, *op. cit.*, p. 309). The procedures in Scottish and Canadian law with regard to private prosecutions may be distinguishable but the basic principle applies equally to both countries. Its significance in the context of this Royal Commission's terms of reference should not be overlooked.

5.5 The special position accorded the Office of Solicitor General in New Zealand prosecutions

In choosing to include the New Zealand system of prosecutions in this memorandum I had several thoughts in the back of my mind. Foremost is the knowledge of the high level of public confidence that has consistently prevailed in that country when assessments are made as to the independence of prosecutorial decision-making. Another consideration was the similarity with the Canadian history of the office of Attorney General insomuch as the holder of that appointment has, so far as living memory goes, been an elected member of the legislature and a member of the Cabinet.

Without digressing too far at this point on the subject of the Attorney General, it is worth noting that the contentious question of Cabinet membership was being actively debated in the New Zealand Legislative Assembly in the mid-nineteenth century long before the same subject aroused political controversy in Britain. As in the early days of representative government in Canada, the former characterization of the office as a Colonial Office appointment made in London was transformed into a political portfolio, the Attorney General being expected to hold a seat in the legislature.

There followed a series of changes in the conception of the office, beginning with the *Attorney General's Act (N.Z.) 1866*, which saw the position revert to its former non-political permanent character. The experiment was short lived. Still exhibiting the uncertainties as to the proper role of the office, the *Attorney General's Act (N.Z.) 1876* provided for both options. The incumbent could be a political or non-political appointment and the same flexibility was extended to his membership of the Executive Council and in the Legislative Assembly. What is interesting to note, for our present purposes, is the simultaneous revival in 1875 of the office of Solicitor General as a permanent non-political appointment, which has been its distinctive characteristic ever since. Furthermore, despite the alternative choices provided for under the 1876 statute, the practice of selecting a member of the legislative body to hold the office of Attorney General has been adhered to without exception up to the present time. A tradition also adhered to, with only one exception during the past 50 years, is for the Attorney General to combine his duties as the senior Law Officer of the Crown with the portfolio of Minister of Justice.[15]

15. The above summary is derived from my 1984 book, pp. 388-391, to which reference should be made for further details.

How then, it might be asked, has the New Zealand system of government avoided the series of problems associated with the Nova Scotia Department of Attorney General wherein, until the recent establishment of a separate Department of the Solicitor General, the Attorney General's Department was ostensibly the provincial Department of Justice with responsibility being vested in the Attorney General for every aspect of the administration of justice? Part of the explanation, I believe, derives from the special relationship between the senior and junior Law Officers of the Crown that has been developed over time in New Zealand. As a result the Solicitor General has come to be regarded as the chief legal adviser to the government and the highly respected public officer in charge of the Crown Law Office. Physically separated from the building that houses the Department of Justice, in which the Attorney General has his ministerial office, the Crown Law Office with its permanent staff of lawyers is run as an independent department of the New Zealand public service. Several of the recent holders of the office of Solicitor General have been elevated directly to become the Chief Justice of New Zealand. As I described the position in 1984:

"The legal work of government, including the provision of opinions and advice on the widest range of governmental activities, is done by the legal staff of the Crown Law Office. Litigation, including prosecutions, in the lower courts is conducted by the Crown Solicitor for the district concerned but other cases brought before the Supreme Court and Court of Appeal, and appearances before commissions of inquiry or other tribunals, are generally handled by counsel from the Crown Law Office led, if the subject matter is of considerable importance, by the Solicitor General himself. Only very rarely will the Attorney General appear as the chief advocate for the Crown or the government...

Under the Crimes Amendment Act 1966 *(No. 98), s. 9(2), power is conferred upon the Solicitor General, with the leave of the Court of Appeal, to appeal against a sentence passed on conviction of any person on indictment, unless the sentence is one fixed by law. Consideration was given, but rejected, by the then Minister of Justice (Mr. Hanan) to making the Attorney General the authorizing Law Officer in appeals against sentence.... In preferring to confer the right upon the Solicitor General, the Minister recognized that it eliminated "direct ministerial responsibility" but argued that it emphasized the need to avoid any suggestion of political overtones in matters of sentencing."* [16]

16. See N.Z. Parl. Debates, H.R. June 15, 1966, pp. 490-504 and Edwards, *op. cit.*, p. 392.

So far I have tended to emphasize the day-to-day functioning of the Crown Law Office and the Solicitor General's relationship to his political superior, the Attorney General. The political record over many years would show the constant recourse for legal advice to the Solicitor General by the Attorney General, by the Prime Minister and the Cabinet of the day, and by the Governor General. In this deference to the Solicitor General's opinion, the general practice reflects the unquestioned acceptance of that office as the final arbiter in legal matters. The danger, however, in exaggerating the continuity of this practice is to distort the constitutional relationship between the Law Officers in New Zealand according to which the Attorney General remains the senior and ultimate source of authority.

In my book on "The Attorney General, Politics and the Public Interest" (1984) I tried to sound a word of warning about the dangers of exaggerating the "independence" of the office of Solicitor General in the New Zealand experience, saying:

"...it fails to recognize the increasing difficulty, experienced in every country, of delineating the boundary line that separates law from political considerations, a difficulty that exerts pressure on the Attorney General to become involved in exercising his ministerial discretion as to the course to be followed by the Crown Law Office. Other considerations that bear on the sensitive nature of this relationship, in which the junior partner, as it were, generally exercises de facto *authority, must include the relative years of experience in office that each of the Law Officers can draw upon, the individual personalities and the strength of commitment that each is prepared to invest in their respective constitutional roles. As often as not the focus for any possible divergence of approach between the Attorney General and the Solicitor General will concern the degree of influence that political considerations should exert on the decision to institute or to terminate criminal proceedings. In interpreting where the balance of public interests should fall it should not occasion too much surprise if the Law Officers, with their different perspectives, should sometimes disagree."* (*op. cit.*, pp.393-394)

From my observations of the New Zealand scene, I have no reason to question the current understanding and commitment to the principle that partisan political intervention is not acceptable in the enforcement of the criminal law. Public education on this question was enhanced in 1978 by the unusual step taken by the then Solicitor General (now Mr. Justice Savage of the New Zealand Supreme Court) in addressing an open letter to the country's leading newspaper, "The Dominion", in which he wrote:

"[The purpose of this letter] is to make clear that political intervention is not, and has not been, acceptable in the enforcement of the criminal law. It does not follow that I am asserting that there never have been attempts to influence the criminal process for political or other reasons; but I believe that the concept of the unacceptability of political considerations in the prosecution process is steadily growing in Parliament, the Government generally and the community." (*op. cit.*, October 2, 1978)

This initiative was prompted by public accusations of alleged government involvement in the staying of a cluster of criminal prosecutions each of which appeared to be tainted with political ramifications. This scenario will be readily recognizable by those who are associated with this Royal Commission. I might just add that, in my conversations with the highly respected Attorney General and Minister of Justice of New Zealand in March 1968, Mr. J.R. Hanan made no bones about describing to me a series of cases that, during his tenure of office from 1960-68, had been the subject of Cabinet discussion and resolution.[17]

Several conclusions derive from the most recent experience in New Zealand concerning the handling of controversial prosecutions. The first of these sees the Attorney General of the day being increasingly disposed to become involved in cases that engender public controversy and, if necessary, to assume full responsibility for making the crucial decision whether to proceed or to stay the proceedings. Secondly, there appears to be a growing disposition for the Attorney General, if he has intervened, to explain publicly his reasons for becoming involved in the decision-making process. Reference to his having relied on the advice of the Solicitor General can be expected to form part of any such public statements. As yet, there have been no occasions in which a difference of opinion between the two Law Officers has been made manifest but, in the nature of things, that possibility cannot be ruled out in highly contentious situations.

The final feature that deserves comment is the repeated reference, in the public exposition of his role by the Attorney General, to the fact that the Government had not taken part in the final decision which had been his alone. These explanatory statements sometimes leave the impression that the Attorney General has not sought any counsel, beyond the Solicitor General, in making up his mind. Since several of the recent high profile situations in New Zealand involved the resolution of volatile industrial disputes, one may be forgiven for questioning the categorical rejection by the Attorney General of any involvement by other concerned Ministers during the discussion

17. Details of these are given in my 1984 book (see *op. cit.*, pp. 394-395), and a review of the controversial decisions that prompted the Solicitor General's public letter in 1978 can be found in the same source (*op. cit.*, pp. 399-402).

stage of the discretionary process. Consultations of that kind may be essential if the correct balancing of interests is to guide the ultimate choice between invoking or not invoking the criminal process. To deny its relevance or its propriety is to cast doubt on the Attorney General's proper understanding of his role, and his exposition of that role in the context of ministerial accountability.

New Zealand has been particularly fortunate in its Solicitors General who have developed within the Crown Law Office a deep commitment to the principle of prosecutorial decision-making that rejects as totally unacceptable any encroachment of partisan political considerations upon the criminal process. Absent such an abiding commitment to this tradition, the New Zealand model may not appear to be the single talisman needed to reform the administration of justice in Nova Scotia. That is not to deny the valuable nature of several lessons that can be derived from that country's experience. It is to that end that I decided to devote one section of this opinion to New Zealand's law and practice in the area of criminal prosecutions. The main elements, however, of the solution to the problems uncovered by this Royal Commission will have to be found elsewhere.

5.6 Conclusions

(i) Reviewing the multiplicity of "independence" constitutions that have come into being throughout the Commonwealth since the end of the Second World War, it soon becomes apparent that controls over the system of prosecutions occupies a major dimension in the government of developing countries. Of the six distinctive models identifiable from this array, three receive concentrated attention in the present opinion because they reflect different approaches to defining the status, powers and accountability of the office of Director of Public Prosecutions.

(ii) Prominent among these alternative approaches is the classic Westminster model in which the D.P.P. is declared to be outside the control or direction of any other person or authority when exercising his discretionary powers. Few of the countries which originally subscribed to this philosophy have continued to do so. In seeking an answer to this phenomenon the lack of any form of accountability is likely to provide the most convincing explanation.

(iii) Variations on the "absolute independence" model are to be found in various jurisdictions, where the inter-relationship between the holders of the offices of D.P.P. and the Attorney General is defined, either in the constitution or by ordinary legislation. These provisions

will need to be borne in mind when comparisons are made with the situation under the laws of the older members of the Commonwealth.

(iv) Another country with strong common law traditions, the Republic of Ireland, in 1974 opted to establish an office of Director of Public Prosecutions. A review of the relevant statutory provisions is undertaken and points of similarity with the Australian approach are noted. To understand the Irish D.P.P.'s office it is necessary first to comprehend the unique position occupied by the Attorney General, whose prosecutorial functions were, with some caveats, transferred to the D.P.P. in 1974.

(v) The substance of the reforms then instituted is captured in the language of the *Prosecution of Offences Act, 1974* which declares that the D.P.P. shall be independent in the performance of his functions. Note is taken of the complementary steps to ensure the fulfilment of this goal, including the composition of the appointments committee, and the procedures governing the removal of an incumbent Director. Another interesting provision, not to be found elsewhere, prohibits the submission of any communications addressed to the D.P.P., or his staff, for the purpose of influencing a decision in relation to pending criminal proceedings.

(vi) As unclear as the procedures in the Dâil Eireann (the Irish Parliament) happen to be concerning the application of ministerial accountability to the offices of Attorney General and the D.P.P., there is a marked division of opinion among the writers as to the importance of such a constitutional doctrine with reference to the Irish situation. Extracts from the opposing positions are included in this opinion so that, in due course, the Commission will be well prepared to make an informed choice in making its recommendations to the Nova Scotia Government.

(vii) The marked differences in approach between the respective parts of Ireland are also analyzed, since many of the problems now being studied by this Royal Commission can be replicated in terms of the Northern Ireland experience. A close look is taken at the consequences flowing from the imposition of direct rule by the Westminster Parliament in 1972 and the assumption of the responsibilities of the Attorney General of Northern Ireland by the English Attorney General. The dimensions of the prevailing relationship between these offices is discussed in the light of the constitutional and statutory definitions in other jurisdictions.

(viii) Reading the expositions by Gordon Coles [the former Deputy Attorney General] of what he conceived was the proper relationship between the RCMP and the Department of Attorney General, persuaded me to include a section describing the Scottish system of responsibility for police investigations and criminal prosecutions. Thus, the role of the police, the procurator fiscal (the rough equivalent of the Crown prosecutor in Canada), the advocates depute in the Crown Office, and the Scottish Law Officers (the Lord Advocate and the Solicitor General) are described with a concentration on those aspects that have a bearing on the outstanding issues before this Commission.

(ix) The Scottish adherence to its system of policing and prosecutions can be traced back over several centuries of its history. Little, if any, criticism is to be heard within its borders as to the degree of centralization that is an integral part of the Lord Advocate's total control over every aspect of law enforcement. An observer may well conclude that the degree of centralized control evidenced in Scottish criminal procedure overshadows that described in the files acquired from the Nova Scotia Department of Attorney General. The subordinate role of the police with respect to the laying of charges is especially important to note.

(x) The final section of this memorandum is focussed on the special position occupied by the Solicitor General in New Zealand. As the titular head of the Crown Law Office he is regarded as the government's chief legal adviser and, among his other duties, he is in charge of the country's prosecutors. The police forces in New Zealand fall within the responsibility of a Minister of Police, paralleling the new Department of the Solicitor General in Nova Scotia. Confusion is immediately apparent if a Canadian attempts to explain to a New Zealander the differences between our two countries when speaking of the role and functions of the Solicitor General. As the practical equivalent of a non-political D.P.P. in New Zealand, the Solicitor General's office in Wellington is located separately from the Ministry of Justice where the Attorney General (and *ex officio* Minister) discharges his multifarious other responsibilities.

(xi) The stature of the office of Solicitor General in New Zealand is a reflection of the qualifications expected of its incumbent. These bear useful comparison with the provisions enshrined in recent Australian statutes where, as we have seen, the holder enjoys the status and tenure protection of a Supreme Court judge. The list of distinguished occupants, many of whom have gone directly to become the Chief

Justice of New Zealand, reflects the respect accorded to the office. It is no accident that the Solicitor General's office is seen as the repository of the highest ideals associated with an impartial, independent prosecution system in which partisan political considerations are not to be countenanced under any circumstances.

May 2, 1988

VI
The Future Role of the Office of Attorney General in the Province of Nova Scotia: Part 1 - The Critical Issues of Independence and Accountability

6.1
Introduction

The main purpose of this concluding two-part opinion is to place before the Commissioners the major issues that surround the future role of the office of Attorney General in Nova Scotia. Standing as this office has done, throughout the province's history, at the apex of the administration of justice, it might be comfortably supposed that there is not much more to be learnt as to what this hybrid appointment is intended to embody. Perhaps one of the enduring benefits that will accrue from this Royal Commission's public hearings is the educational insights that are being imparted by key witnesses, who are required to reveal the innermost workings of a department that has never been accustomed to such levels of public disclosure. Demonstrating what went wrong and what should not have been done is not, however, the more difficult part of the public exercise. The challenge for this Commission is to recognize where the major faults lie in the system that has been in place for so long and, having established what these weaknesses are, to expound the remedies that lie at hand.

Up to this point I have explored the various approaches resorted to in other jurisdictions, particularly in the distinctive offices of Special Prosecutor or Independent Counsel in the federal system of the United States and that of Director of Public Prosecutions in different parts of the Commonwealth. Certain lessons emerge from this comparative study and it is now incumbent on me to integrate these findings with an examination of proposals for reform of the office of Attorney General, the ultimate source of authority in matters of public prosecutions. Until a short while ago, it would have been necessary to refer to the Attorney General's office in Nova Scotia as the embodiment of final jurisdiction in all matters of law enforcement and corrections, as well as prosecutions. With the separation of these responsibilities in December 1987, and their assignment to a new Department of the Solicitor General, the future role of the office of Attorney General might, in some minds, remain isolated from the repercussions that follow upon this governmental reorganization. This cannot be entirely so, but one of the major sources of potential conflict, among the many roles into which the Attorney General is cast, has been removed.

In Part I of this concluding opinion I shall concentrate on explaining the great importance of the concepts of independence, control and accountability as these relate to the Attorney General. Not surprisingly, perhaps, there are differences of opinion with respect to these central themes and I am anxious that the Commissioners have presented for their consideration the conflicting interpretations. Getting the answers to these questions right is likely to be one of the most lasting contributions that the Commission can make to Nova Scotia, and to other parts of Canada which are

following the Commission's proceedings with obvious attention. Part II will seek to evaluate the options with respect to the place that a statutory Director of Public Prosecutions might occupy in the provincial justice system. Given my firm adherence to the principle of ministerial responsibility, I shall approach this question with a deep concern to find a solution that reflects the complementary ideals of independence and accountability upon which public confidence ultimately rests. Central to the attainment of these objectives is the delineation of the inter-relationship between the D.P.P. and the Attorney General. This will be the principal focus of the final part of this opinion.

6.2
Present day essential characteristics of the office of Attorney General in Nova Scotia

In seeking an understanding of how successive holders have viewed their responsibilities as Attorney General of Nova Scotia, one element that keeps surfacing is the commitment, outwardly at least, to following British constitutional traditions. What, however, is also becoming apparent, as this Royal Commission examines in depth the practices followed within the Department of Attorney General, is that protestations of adherence to British constitutional precedents, as they relate to the Law Officers of the Crown, have not always been followed through. Separating the theories from the practices of the Department must, therefore, be ever present in the minds of those who seek to portray the essential characteristics of the present day Attorney General in Nova Scotia.

It is no mere coincidence that the original member provinces at the time of Confederation chose to continue, for many decades after 1867, their reliance upon the constitutional conventions and customs that had prevailed in their jurisdictions before the new Dominion was brought into existence. Thus, the newly established provinces of Nova Scotia and New Brunswick, in line with the former colonies of Upper and Lower Canada, persisted in relying upon the readily available precedents of earlier years in interpreting the prerogative powers of the Attorney General. And even when in 1900 Nova Scotia saw fit to follow the earlier example of Manitoba in setting forth, in statutory form, the main functions of its Department of Attorney General, we find inserted a provision stating that the provincial Attorney General:

"shall have the functions and powers which belong to the office of Attorney General of England by law or usage so far as the same are applicable to the province." (R.S.N.S. 1900, c. 10, s.3(6))

Similar clauses are to be found in the original federal *Department of Justice Act, 1868* (31 Vict., c.39), and in the parallel provincial statutes in Newfoundland (1898), British Columbia (1899), Saskatchewan (1906), Alberta (1906) and Ontario (1969) (see Edwards, "Ministerial Responsibility for National Security", 1980, pp. 11-19 and Stenning, "Appearing for the Crown", 1986, pp. 79-87). Reaffirmation of the historic links between Nova Scotia and Britain is contained in the same *Public Service Act, 1900* which, in referring to the duties associated with the office of Attorney General, added a clause referring to:

"the functions and powers which previous to the coming into force of the British North America Act 1867, *belonged to the office of Attorney General in the province of Nova Scotia and which under the provision of that Act are within the scope of the powers of the Government of the province." (loc. cit.)*

Reading the terms in which the "functions, powers and duties" of the Attorney General are expressed in the 1900 legislation - these are continued without change in the latest enactment to set forth the Attorney General's responsibilities (R.S.N.S. 1967, c. 255) - it soon becomes apparent that many questions are left unanswered by the mere recapitulation of the traditional roles associated with the office. We learn that the Attorney General is "the Law Officer of the Crown", "official legal adviser of the Lieutenant Governor" and "the legal member of the Executive Council". The advisory function extends to matters of law that are of concern to the departments of government, but there is no mention of the Law Officers' historic duty to act as legal advisers to the House of Commons (see Edwards, "The Attorney General, Politics and the Public Interest", pp. 207-235), a subject that has never been properly understood either in the Canadian Parliament or in the provincial legislatures. What the Nova Scotia legislation does emphasize is the Attorney General's duty to "see that the administration of public affairs is in accordance with law", and to "superintend all matters connected with the administration of justice in the province" that does not lie within the jurisdiction of the Government of Canada. There is a final confirmation of the Attorney General's powers to "regulate and conduct" all litigation that involves the Crown or any department of government.

Having reviewed all of these functions, the full dimensions of the office are still left incomplete. A number of general elements, important to an understanding of the constitutional position occupied by the office of Attorney General, are not legislatively prescribed.

Prominent among these, from a Canadian perspective, is the constitutional convention that the person who occupies the position of Attorney General should have been elected to a seat in the provincial legislature. This convention can be traced back to the transformation that took place when representative, and later, responsible government began to take hold in the former colonies and membership in the Legislative Assembly was no longer (as in the earlier Legislative Council) within the prerogative authority of the British appointed Governor.

Occupying a representative seat in the Legislative Assembly is not, in itself, the primary consideration so far as the Attorney Generalship is concerned. As a Member of the Legislative Assembly (M.L.A.) the incumbent must discharge the normal duties of representing the constituency that has elected him. In this regard, the Attorney General occupies no different position than that of every other member of the legislature, be it as a member of the political party that is in power or the party that sits on the Opposition benches. What this seat in the legislature more importantly represents is the same condition that underlies the whole doctrine of ministerial responsibility, as understood in the British system of parliamentary democracy. Every Minister of the Crown is accountable to Parliament or the legislature for the exercise of his individual portfolio, whether this is by way of having to answer questions about his department, responding to motions that criticize departmental decisions, defending the departmental budget or legislative measures for which the Minister is responsible. The Attorney General of Nova Scotia has always been subject to the same form of parliamentary supervision as that which applies to other members of the administration.

In one important respect, however, namely membership within the Cabinet, there is a major difference in constitutional practice between Nova Scotia (and the rest of Canada) and the United Kingdom, respectively. Ever since 1928 the Attorney General of England and Wales has been excluded from the list of Ministers who are accorded Cabinet rank and who constitute the Cabinet of the day. The Attorney General is, nevertheless, a standing member of several important Cabinet Committees and frequently attends meetings of the full Cabinet in his capacity as chief legal adviser to the Government. Recent holders of the office in England have been sharply divided in their conception of how important it is for the Attorney General to be privy to the regular deliberations of the Cabinet. Given the Canadian tradition of full membership with voting rights, we need not pursue the philosophical differences represented by the opinions of Mr. (now Lord) Silkin and Sir Peter (now Lord) Rawlinson (see Edwards, "The Attorney General" pp. 58-79). I should explain here

that not every Minister who forms part of the administration (or the Government) in the United Kingdom automatically becomes a member of the inner circle of senior ministers who enjoy Cabinet rank. Exclusion of the Law Officers of the Crown from that select list of Cabinet ministers was not the result of defining the non-importance of the Attorney General, the Solicitor General, and their Scottish counterparts. On the contrary, exclusion was deemed to be infinitely preferable if the independence from political direction, with which the Law Officers are expected to discharge their prosecutorial functions, was to become publicly understood. Whether this tradition, adhered to consistently in the United Kingdom for the past 60 years, is reflective of the correct principle will have to be explored more fully later on.[18]

18. For a full account of the evolution of the British practice, see "The Law Officers of the Crown" (1964), Chapter 9.

For the present, we need only note that from the inception of Confederation the Attorney General of Canada, by virtue of the integration of his office with that of Minister of Justice, has consistently been a senior member of the federal Cabinet. Of some historic interest, perhaps, is the example set by the first Prime Minister of Canada, Sir John A. Macdonald, who combined his responsibilities as First Minister from 1867 to 1873 with those of the Minister of Justice and Attorney General of Canada. Extraordinary as this may now seem to modern standards, there have been many instances well into the present century where the Premier of a provincial government also fulfilled the duties of Attorney General. The paucity of legally trained members of the Executive Council in those early days readily provides the explanation for this unusual circumstance (see Edwards, "Ministerial Responsibility" pp. 35, 39 and fn. 115). It also explains the earliest precedents in the colonial history of Nova Scotia, which can be seen to be replicated across Canada and the Commonwealth, wherever Crown Colonies once existed. The public records of those times record the holder of the office of Attorney General as being one of the three permanent officials (the others were the Colonial Secretary and the Colonial Treasurer) who, under the Governor, comprised the Executive Council. All were appointed by the Secretary of State for the Colonies in distant Whitehall.

I have attempted to describe elsewhere the development in the 1830's and 1840's of the Executive Council's growing sense of accountability to the Legislative Assembly, a large part of this change being attributable to the increased political activity on the part of those native born Canadians who occupied the positions of Attorney General and Solicitor General. The internal dilemmas associated with this redefinition of the Law Officers' role is readily perceived when it is understood that, at that period, appointments to both offices, Attorney General, Solicitor General, and their

membership within the colony's Executive Council, derived from the exercise of prerogative powers by the Secretary of State for the Colonies. Unlike other parts of the former British Colonial Empire, however, notably South Australia, New South Wales and New Zealand which engaged in serious debate up to the late 1870's on the choice between a non-political and political Attorney General, there has been no concerted move in any part of Canada since 1850 to exclude the Attorney General of the day from membership of the federal or provincial Cabinets (see Edwards, "Ministerial Responsibility" 1980, pp. 35-40 and Stenning, "Appearing for the Crown", 1986, pp. 63-68).

When differences between Canadian and British constitutional practice regarding the Attorney General's place in the Government are adverted to, I frequently note the error creeping in which confuses membership in the United Kingdom Cabinet with membership in the Government. I mention it again only to emphasize the point that the office of Attorney General in both jurisdictions is held by a Minister of the Crown. Until the end of last year, the Attorney General of Nova Scotia was also effectively the province's Minister of Justice. Elsewhere in Canada the federal Minister of Justice is the designated member of the Executive Council who *ex officio* also holds the position of Attorney General of Canada (see Edwards, "Ministerial Responsibility", p. 8). The significance of these distinctions does not necessarily lie in clarifying the nomenclature that is used. My memorandum on the implications of creating a Department of the Solicitor General in Nova Scotia dealt with the repercussions that this step represents so far as the Department of Attorney General is concerned. I shall have occasion later to revert to some of these issues, with the future of the Attorney General's office specifically in mind.

6.3 Should the office of Attorney General be changed into a public service appointment?

It will be recalled that in the preceding opinion, entitled "A series of alternative approaches", I included a list of six different models that are identifiable from the multitude of Commonwealth constitutions as defining the political or non-political nature of the offices of Attorney General and Director of Public Prosecutions. In my previous submissions to the Commission I have tended to concentrate on the office of the Director of Public Prosecutions and to offer an assessment of the essential conditions that should attach to that particular appointment. In doing so, I was deliberately pointing to the direction which Nova Scotia should be urged to follow. In this memorandum I intend to place the major concentration on the senior position of Attorney General and to

examine what I consider to be the central issues that surround this office at the present time.

As a reminder, let me begin by quoting again from my Winnipeg paper to the Commonwealth Law Ministers in 1977. In it I summarized the following categories, from which it will readily be seen that the version familiar to Nova Scotia (and the rest of Canada) is Model No. 3.

Model No. 1

Where the Attorney General is a public servant, combines with his office the functions of a Director of Public Prosecutions and is not subject to the directions or control of any other person or authority.

Countries exemplifying this model include Kenya, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Botswana and the Seychelles.

Model No. 2

The Attorney General is a political appointment. He is a member of the Government but, although holding ministerial office, he does not sit regularly as a member of the Cabinet.

Alone of all of the Commonwealth countries, strangely enough, the Attorney General of England and Wales typifies this particular category.

Model No. 3

The Attorney General is a member of the Government and, as such, is normally included within the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of Attorney General is combined with the portfolio of Minister of Justice (or similar title).

Most of the Canadian provinces and the Federal Government have adopted this model. Other countries that fall within this category include Australia (both the States and the Commonwealth Government), Nigeria and Ghana.

Where, in these jurisdictions, there exists a Director of Public Prosecutions the Director is, in the ultimate analysis, subject to the direction and control of the Attorney General." (Minutes of Meeting and Memoranda, pp. 200-201)

By way of elaboration on what I wrote in 1977, it remains true that where there exists a Director of Public Prosecutions (or Director of Crown Prosecutors or any similar title) in any Canadian jurisdiction that office is looked upon as a public service appointment. The occupant is a public servant who must follow the instructions of his superiors and that of the Minister in charge of the Department. Australia, on the other hand, has departed from the straightforward definition contained in my 1977 paper. As I have detailed in my opinion on "The Office of D.P.P. - the Australian Experience" major changes are now in effect in that jurisdiction, both federally and in most of the States, significantly altering the constitutional relationship between the pertinent Attorney General and the Director of Public Prosecutions. What has not changed in any of the several parts of Australia, however, is the political nature of the office of Attorney General. Each occupant is still chosen from the ranks of the elected members of the House of Representatives or Legislative Assembly, as the case may be.

Questions concerning the justification for retaining a system in which an active politician and member of the Cabinet is entrusted with the ultimate powers of direction over public prosecutions are discernible from time to time, especially on those occasions where doubts are entertained regarding the impartiality of a particular prosecution. These criticisms are common to all the countries that subscribe to the political model of its Attorney General. If the *status quo* is to be advocated by this Royal Commission it must be prepared to do more than express its confidence in the existing constitutional practice.

There are many strands of legal principle that distinguish Canadian constitutional law from English constitutional law, foremost among which is the advent of the Charter of Rights and Freedoms and its provision enabling the courts to review prerogative decisions by the executive branch, including those exercised as an inherent part of the historic office of the Attorney General.[19] These changes, recognized and applied by the Supreme Court of Canada in *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441, need to be remembered when considering the relevance to the Canadian situation of the highly influential opinion of Lord Shawcross following the decision of the House of Lords in the famous case of *Gouriet* v. *Union of Post Office Workers*, [1978] A.C. 435. Two inter-related objections to the House of Lords' restatement of the law are at the root of the philosophy expressed by Shawcross himself, a former Attorney General of England and Wales. The first of these questions the claims of the Attorney General, as a political member of the Government, to be the exclusive repository for enforcing or not enforcing public rights. The other objection is to the rejection by the

19. The ramifications of this change, as they impinge upon the office of Attorney General, are explored in my essay "The Attorney General and the Charter of Rights" (R.J. Sharpe (ed.) "Charter Litigation" Toronto, (1987) pp. 45-68)

English courts of jurisdiction under existing English law to review decisions made by the Attorney General when acting in his prerogative capacity. As another former Attorney General, Lord Rawlinson, has explained:

"The case of Gouriet *v.* H.M. Attorney General and others [*sic*] *brought to the surface the doubts which lurk in some minds that no person can, or no person nowadays appears to, carry out the quasi-judicial duties of Law Officer while at the same time serving in a modern Ministry. The system, according to this view, which was acceptable in the 19th century is no longer acceptable in the second half of the 20th [century]."* ((1977) 74 Guardian Gazette 798 at p.799)

By far the most significant voice raised in recent years, in support of the view that it is time to seriously consider transforming the office of Attorney General into that of a non-political appointment, is that of the former Labour Attorney General, Sir Hartley (now Lord) Shawcross. It was he who in 1951 delivered the classic statement of principle relating to the independence of the Law Officers of the Crown in discharging their prosecutorial functions (see H.C. Deb., Vol. 483, cols. 683 - 684, Jan. 29, 1951). Commenting on the House of Lords decision in *Gouriet,* in a letter to the Editor of "The Times", Shawcross sought to draw attention to the realities as well as the constitutional theory behind the doctrine of ministerial accountability as it relates to the English Attorney General. He wrote:

"... the theory that the Attorney General is answerable to Parliament may have been true enough in the days of Dicey although its application has (consider, for instance, the famous Campbell case*) by no means always been that which is sometimes complacently assumed... The fact is we have moved away from Dicey's age of reasoned democracy into the age of power. Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there which is the party to which the Attorney General of the day must belong... That the present Attorney General has acted in the utmost good faith is not the question. But it requires no great stretch of the imagination to assume that at some future date we might have a majority in Parliament of extreme left or extreme right persuasion with an Attorney General of similar views. True to the well known Leninist (which was also the Fascist) strategy, such a Law Officer might well consider it his duty to manipulate the law so as to further the philosophy in which he believed or at least decline to enforce it*

in a way which would be thought inappropriate by his political colleagues." (*op. cit.*, August 3, 1977)

Such language may seem totally divorced from the political experience of Nova Scotia, but it is not so difficult to see the essence of Shawcross's warning as to what may be in store if no thought is given to the problems associated with a highly partisan Attorney General and a passive legislature. It is against this kind of background that Lord Shawcross proceeded to question whether:

"...the once great office of Attorney General should now become one wholly outside the political arena and enjoying in the task of law enforcement the status and independence of a Judge. Of course the Government would still require Law Officers to supervise and conduct Government litigation, although court appearances nowadays seem to be far less frequent than before. But the enforcement of the rights of the public and the rule of law would then be given not only the reality (which I hope it still has) but also the appearance (which it now lacks) of complete detachment from party politics. And the holder would be entitled to consider without fear or favour the effect which, e.g., a prosecution might have 'upon public morale and order.' Be it noted that when I used that phrase long ago I said and meant public and not party or trade union morale." (*loc. cit.*)

The former Attorney General's cry has not produced even the rumblings of imminent change in Britain. Elsewhere, as I have noted in my analysis of Commonwealth models, the non-elected public servant categorization of the Attorney General's office is by now well entrenched in countries like India, Singapore, Kenya, Malta, and Cyprus. And in other member countries we find the Director of Public Prosecutions, not the Attorney General, as a senior public servant with varying degrees of independence from governmental direction or control.

At first glance, the arguments advanced by Lord Shawcross have an attractive quality, directed as they are to guaranteeing those critical elements that engender public confidence in the administration of justice. The danger, as I see it, is the comfortable belief that the public servant model and not the political route is the key to attaining these objectives. Having had the opportunity, off and on during the past 20 years, to visit most of the Commonwealth jurisdictions and to observe different structures and systems within which the Attorney General exercises his traditional functions, I am forced to conclude, as I informed the assembled Justice Ministers in 1977, that:

"The basic question is who should be the final arbiter of legitimate political considerations affecting prosecutions, the Cabinet, the Prime Minister or Chief Executive, or the Attorney General (or Director of Public Prosecutions if the constitution has made the office truly independent). In my view, it is not only proper but desirable that the Attorney General (or the D.P.P.) should exercise both legal judgment and an appropriate degree of political sensibilities when assessing the weight to be given to relevant political considerations of the legitimate kind to which I have referred earlier. Where matters of high state or the general public interest are involved it makes eminent sense for the Attorney General to consult his ministerial colleagues, including, if necessary, the Chief Executive, with a view to estimating their particular contributions to an understanding of the wider issues that may be involved. Hopefully, the occasions where such consultations become advisable will be few and far between. In any event, what must not be allowed to happen is an abdication by the Attorney General of his ultimate authority and responsibility for making the final decision. This may be thought to be counselling the ideal situation and I recognize how far short the actual practice may fall in fulfilling this kind of proper relationship. In my Commonwealth visits I was reminded again and again of how important harmonious relations between the Attorney General and the Director of Public Prosecutions of a state were to the effective functioning of a system dedicated to the ideals of independence and impartiality in matters of prosecution.

Given a thorough understanding and respect for the above principles on the part of ministers, politicians, public servants and those who shape public opinion, there would be every reason to look with increased confidence to the sustaining of the essential qualities in each country's administration of justice. Regrettably, I cannot say that I have found such respect and understanding to be commonplace. The experience of both the older and newer members of the Commonwealth confirms my deep seated conviction that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character and personal integrity of the holder of the offices of Attorney General (or Solicitor General in some countries) and that of the Director of Public Prosecutions which is of paramount importance. Furthermore, such qualities are by no means associated exclusively with either the political or non-political nature of the office of the Attorney General. Instances of indefensible distortion of the Attorney General's powers can be documented in countries which have subscribed to the public servant model of that office, equally with the occupancy of the ministerial portfolios of Attorney General and Minister of Justice in

other countries of the Commonwealth. It is these kinds of situations that induce general disillusionment with democratic government. For me it was heartening to hear the permanent officials of the Attorney General's Department in country after country expressing a firm acknowledgment of the great good which was in their power to contribute to the general welfare of society. This goal was seen to be possible only if there was adherence to the basic principle of maintaining independence and resisting partisan political pressures in the related areas of criminal law enforcement and prosecution. This lesson, unfortunately, is still far from being universally understood." (Minutes of Meeting and Memoranda, Commonwealth Secretariat, 1977, pp. 202-203; reprinted as Appendix 'A' to my monograph "Ministerial Responsibility for National Security", 1980.)

There is another, more fundamental, objection to the Shawcross solution and it bears directly on the possible recommendation by this Commission that a statutory office of Director of Public Prosecutions should be established in the province of Nova Scotia. Whether the state official in charge of the machinery of public prosecutions is called the Attorney General or the D.P.P., if he is to be a public servant the question arises, to what Minister of the Crown, if any, is the non-elected official to be ultimately responsible? And what is to be the extent of the Minister's accountability for the actions and decisions of the non-elected Attorney General or D.P.P.? I find it strange that Lord Shawcross would choose to totally ignore this aspect of the problem he was addressing. Unless the total elimination from review by Parliament (or the legislature) is envisaged, with the termination of the elected representatives' right to scrutinize controversial prosecutorial decisions, there will remain the necessity of having a Minister of Justice (or similar title), with a seat in the legislature, to ensure that the principle of ministerial accountability is ever present no matter what the circumstances that involve the Attorney General (or the Director of Public Prosecutions) might be. The exact scope of this accountability will need to be deferred until I put forward my recommendations with respect to the office of D.P.P. At this stage I merely repeat the warning that I have stated elsewhere, to the effect that any attempt to totally isolate the responsible Minister from independent public officials in the area of criminal prosecutions is fraught with major perils.

6.4 The concept of "independence" with specific reference to the Attorney General as a member of the Cabinet

In several of my previous opinions I have referred to questions of independence, control and accountability as these terms relate to a political Attorney General, in his capacity as a Minister of the Crown, and also to the Director of Public Prosecutions, in his capacity as a public official whose authority and powers derive from statutory provisions. In this and the following section I intend to concentrate my attention on explaining the exact meaning to be accorded these central concepts when speaking of the Attorney General as a member of the Cabinet. The literature on these topics is somewhat scant and there exists a difference of opinion on some aspects as between my colleague Philip Stenning and myself. It is important, therefore, that both points of view be placed before the Commissioners in sufficient depth to appreciate the substance of the disagreement. At the expense of having to rely heavily on quotations from our respective writings I propose to begin by expounding where I stand on these questions, then to give equal expression to Dr. Stenning's views, and finally to offer my observations on his position.

A full account of the slow development towards establishing the principle of the English Attorney General's independence from political control by the Cabinet is contained in Chapters 10 and 11 of my book "The Law Officers of the Crown". The turning point in this constitutional epic was the famous Campbell case in 1924 and its ignominious handling by the first Labour Government under Ramsay MacDonald. Arising out of a controversial decision to prosecute the acting editor of the "Workers Weekly", a Communist publication, on charges of inciting mutiny, the Attorney General, Sir Patrick Hastings, and the Acting Director of Public Prosecutions, were summoned to a meeting with the Prime Minister. At that meeting Ramsay MacDonald expressed the view that the prosecution had been ill advised from the beginning. Hastings replied that he had come to the conclusion that the prosecution should be withdrawn. Nevertheless, the Attorney General was instructed by the Prime Minister to attend the Cabinet meeting later the same day so that he could inform his ministerial colleagues what the fuss was all about. Writing in 1964, on the basis mainly of the public record available at the time, I concluded that whatever influence may have been exerted by the Prime Minister or by members of the Cabinet there was no reason to conclude that Hastings had reached his decision to stay the prosecution other than by the exercise of his independent judgment.

At the heart of the dispute, that later spilled over on to the floor of the House of Commons, was the contents of a Cabinet minute that had been leaked to the Conservative Opposition. It purported to lay down the principle that "no public prosecution of a political character should be undertaken without the prior sanction of the Cabinet being

obtained". Subsequent evidence, mainly in the "Whitehall Diary" (London, 1969) kept by Sir Thomas Jones, the then Assistant Secretary to the Cabinet, indicated that my earlier judgment of Sir Patrick Hastings' conduct as the Attorney General had been too charitable. In 1964, I had wondered whether the MacDonald Cabinet's instruction had been reached in the presence of the Attorney General or following his departure from the Cabinet room. It now turns out that the Cabinet motion defining how political prosecutions were to be handled had been passed unanimously in the presence of the Attorney General. Far from representing the embodiment of political independence from the Cabinet in exercising his prosecutorial responsibilities, Hastings is seen as a compliant Law Officer of the Crown anxious and ready to do the bidding of his political colleagues assembled in the Cabinet Room. The Prime Minister's evasions and worse in the ensuing Commons debate contributed to the Government's defeat. The new Prime Minister, Stanley Baldwin, finding an early opportunity to debate the Campbell case afresh in Parliament, declared that the Labour Government's instruction "was unconstitutional, subversive of the administration of justice and derogatory to the office of Attorney General. His Majesty's Government have therefore given directions that the instruction be excised" (H.C. Debates, Vol. 179, Cols. 354-355, Dec. 11, 1924).

This short account of the central place now occupied by the Campbell case in English constitutional law should not overlook the sorry chronicle of other famous English Attorneys General who, in the years immediately following and during the First World War, participated actively in Cabinet deliberations in which the Cabinet, not the Attorney General, is seen making the final decision as to whether or not criminal proceedings should be instituted. Among these former Law Officers, who deferred to the collective view of the Cabinet, were Sir F.E. Smith (later to become Lord Birkenhead, L.C.) and Sir Gordon Hewart (later recognizable as Lord Hewart C.J.). From 1924 onwards, however, there has been an unquestioned commitment, by all the political parties in the United Kingdom, to recognize the special position occupied by the Law Officers of the Crown. This constitutional convention was well expressed by the former Prime Minister, Harold Macmillan, speaking in the House of Commons on February 16, 1959, when he stated:

"It is an established principle of government in this country, and a tradition long supported by all political parties, that the decision as to whether any citizen should be prosecuted, or whether any prosecution should be discontinued, should be a matter, where a public as opposed to a private prosecution is concerned, for the

prosecuting authority to decide on the merits of the case without political or other pressure. It would be a most dangerous deviation from this sound principle if a prosecution were to be instituted or abandoned as a result of political pressure or popular clamour...I think that it would be the general view of the House that it would be a very bad thing if the House or the Cabinet of the day tried to influence the semi-judicial functions of the Law Officers in the institution or the dropping of prosecutions." (H.C. Debates, Vol. 600, Col. 31)

Further confirmation of the general acceptance of this convention, long before the aberration associated with the Labour Government's handling of the Campbell case in 1924, can be found in parliamentary statements by Lord Eldon in 1793, Mr. Gladstone in 1873, and Lord Salisbury in 1896 (see Edwards, "The Law Officers of the Crown" pp. 184-186). And in 1903 we find A.J. Balfour, as Prime Minister, adhering to the same principles and stating:

*"It is due to the Attorney General to say in the clearest manner, not only in the interests of the Attorney General but in the interest of all, that his position as the Director of Public Prosecutions [*sic*] is a position absolutely independent of any of his colleagues. It is not in the power of the Government to direct the Attorney General to direct a prosecution. No government would do such thing; no Attorney General would tolerate its being done."* (Parl. Debates, Vol. 118, ser. 4, Cols. 376-377, Feb. 19, 1903)

In looking for an elaboration of the doctrine adverted to in the above passages, it is necessary that I include the frequently quoted statement by Lord Shawcross, made when he was the Attorney General of England and Wales in 1951. This carefully prepared declaration (see Edwards, "The Attorney General" pp. 318-324) has come to be regarded as the classic exposition of the constitutional position occupied by the British Attorney General. According to Shawcross:

"I think the true doctrine is that it is the duty of an Attorney General, in deciding whether or not to authorize the prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government and indeed, as Lord Simon once said, he would in some cases be a fool if he did

not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations." (H.C. Debates, Vol. 483, Cols. 683-684, January 20, 1951)

So far I have concentrated on establishing the firm existence of a constitutional convention in English law which defines the special position accorded to the Law Officers of the Crown, especially in matters of criminal prosecution. In undertaking a review of Canadian authorities on the same subject (see Edwards, "Ministerial Responsibility for National Security", 1980, pp. 65-69) I came across numerous statements made by Canadian Prime Ministers, within living memory, which would indicate either a rejection of the principles enunciated in the British House of Commons for nearly two centuries of its constitutional history or as a demonstration of a lack of awareness or understanding of these same principles in the Canadian Parliament (*op. cit.* pp. 65-67). This lack of awareness can no longer be said to be so, though it would be rash to conclude that a few pronouncements, no matter how eminent the exponent, indicate universal adherence across Canada to the British constitutional convention. Recent events, in many parts of the country, including Nova Scotia, would dictate a note of caution in assessing where the vaunted independence of the Attorney General presently stands in the constitutional practice of the federal and provincial governments.

Just how influential the discussions at the Law Ministers Conference held in Winnipeg in 1977 may have been in shaping the mind of the Canadian representative, Mr. Ron Basford, the then federal Minister of Justice and Attorney General of Canada, may never become fully known. What can be stated, however, is that no comparable exposition will be found in the previous annals of the House of Commons in which the Attorney General saw fit to define his position vis-à-vis the rest of the Cabinet when fulfilling his prosecutorial responsibilities. Addressing the Commons on his handling of the *Official Secrets Act* proceedings against Tom Cossitt, a Member of Parliament, and the "Toronto Sun", Attorney General Basford explained:

"I am aware that, since the enactment of the Official Secrets Act, *this would appear to have been the first occasion in Canada where consideration has to be given to the provisions of the* Official Secrets Act *and the right of a member of the House to freely express his views in the House in the course of carrying on his parliamentary business. The first principle, in my view, is that there must be excluded any consideration based upon narrow, partisan views, or based upon the political consequences to me or to others. In arriving at a decision on such a sensitive issue as this, the Attorney General is entitled to seek information and advice from others but in no way is he directed by his colleagues in the government or by parliament itself. That is not to say that the Attorney General is not accountable to parliament for his decisions, which he obviously is... Clearly, I am entitled to seek and obtain information from others, including my colleague, the Solicitor General, and the Commissioner of the Royal Canadian Mounted Police on the security implications of recent disclosures. This I have done. In my view, the special position of the Attorney General in this regard is clearly entrenched in our parliamentary practice. Based on these authorities and on my own experience as a member of the government for ten years, which has included my three immediate predecessors, this special position has been diligently protected in theory and in practice. In arriving at these [governing principles] I have been guided by recognized authorities such as Lord Shawcross, Edwards, Erskine, May and Bourinot, and more recently and very helpfully, my valuable discussions with Commonwealth Attorneys General in Winnipeg, and more particularly my personal conversations at that time with the Attorney General of England and Wales [Mr. Silkin] and the Lord Chancellor [Lord Elwyn Jones]."*
(H.C. Debates [Canada], Vol. 121, pp. 3881-83, March 17, 1978)

I have already remarked on the contrary evidence, derived from the statements of former Prime Ministers of Canada, irrespective of party affiliation, which belie Mr. Basford's claim that the Attorney General's "special position has been diligently protected in theory and practice" for the decade preceding his above quoted statement.

Experience across Canada since that statement was made in Ottawa in 1978 has been infinitely more corroborative of a conscious adherence to the principles incorporated in the classic statement by Sir Hartley Shawcross.

Shortly after his predecessor had spoken on the subject, Senator Jacques Flynn, speaking as the Attorney General of Canada, declared:

"In dealing with a case which has been referred to him, the Attorney General is unquestionably entitled to obtain information and advice from whatever sources he sees fit, including his colleagues in Cabinet. The course of action which he adopts in particular cases must, however, in the last analysis be his decision. The Attorney General does not act on directions from his colleagues, other members of Parliament or anyone else in discharging his duties in the enforcement of the law. On the other hand he must, of course, be prepared to answer in Parliament for what he does. These principles are well known and established not only in Canada, but in the United Kingdom and elsewhere where the system of Parliamentary democracy exists." (See Appendix to Senate Debates, October 18, 1979.)

More recently, Hon. John C. Crosbie, a former Attorney General of Canada, referring to the *Borowski* case, declared: "The Government cannot direct the Attorney General, nor the Law Officers of the Crown, as to what legal opinions they must produce" (H.C. Debates, August 17, 1988, Oral Questions, p. 18438). Another occupant of the same office, Hon. Mark MacGuigan, expressed himself in precisely the same terms when responding to the recommendations of the McDonald Commission.[20] Attention is also drawn to the explanation offered by Hon. Roy McMurtry, then the Ontario Attorney General, when defending his decision not to proceed with a forgery prosecution, arising out of his involvement with an abortion consent form, against Mr. Francis Fox, M.P. (a former Solicitor General of Canada). Citing the passage from Sir Hartley Shawcross's classic statement, quoted above, McMurtry declared that "not merely is this the law of Canada as well as England, but it also reflects very accurately the responsibilities of the Attorney General of Ontario, certainly as I have experienced them during the last two-and-a-half-years" (Ontario Legislature Debates, Dec. 23, 1978).

More recently, in an address to a Canadian Bar Association seminar on "The Role of the Attorney General and the Charter", the present Attorney General of Ontario, Hon. Ian Scott, commented on the fact that although responsibility for prosecutions obviously pre-dates the Charter of Rights, the traditional constitutional requirements that have applied to the Attorney General's exercise of prosecutorial authority provide a valuable perspective on the way in which the Attorney General should approach other duties to which the Charter may be related. Scott invoked the 1968 "Report on Civil Rights in the Province of Ontario", in which the late Chief Justice McRuer had asserted:

20. See the Department of Justice memorandum, "The Position of the Attorney General of Canada on Certain Recommendations of the McDonald Commission", August 1983, pp.6-9.

"[The Attorney General] must of necessity occupy a different position politically from all other Ministers of the Crown. As the Queen's Attorney he occupies an office with judicial attributes and in that office he is responsible to the Queen and not responsible to the Government. He must decide when to prosecute and when to discontinue the prosecution. In making such decisions he is not under the jurisdiction of the Cabinet nor should such decisions be influenced by political considerations. They are decisions made as the Queen's Attorney, not as a member of the government of the day." (Report No. 1, 1968, Vol. 2 at p. 934)

Expressing his own understanding of where the Attorney General's constitutional obligations lie, Ian Scott concluded:

"...issues of whether to institute or discontinue a prosecution are not matters of government policy. The Premier and Cabinet have no power to direct whether a particular prosecution should be pursued or whether a particular appeal should be undertaken. These decisions rest solely with the Attorney General, who must be regarded for these purposes as an independent officer, exercising a function that in many ways resembles the functions of a judge.... The absolute independence of the Attorney General on questions of prosecution policy is accepted as an important constitutional principle." ((1986-87) 29 Crim. L.Q. 187 at p. 190 and 191)

6.5 The academic debate on the application of the "independence" principle

In several of the instances quoted above my own views have been relied upon. It may be appropriate, therefore, to present, as illustrative of where I stand, the analysis that I offered as part of my Viscount Bennett Lecture in the University of New Brunswick in October 1986 when I stated:

"As I look across Canada I observe a growing concern with defining the true role of the Attorney General in such a way as to demonstrate the independence of prosecution decisions... Underlying these expressions of dissatisfaction with the existing state of things are the inherent difficulties in convincing the ordinary person that an elected politician, when placed in charge of the machinery of prosecutions, will be capable of casting aside all forms of partisan political pressures when determining whether or not the criminal law should be allowed to follow its normal course. Uppermost in the minds of those who place a high premium on safeguarding the independent and impartial exercise of prosecutorial decision-making is the vital necessity of resisting improper political pressures.

In all of my writings on the Office of the Attorney General I have endeavoured to express the reasons why I subscribe fully to this fundamental proposition. At the same time, I have also been at pains to explain why I regard it as essential to clarify the precise meaning that is to be accorded the term "politics" when speaking in the present context. This task is essential if serious misunderstandings are to be avoided and acceptable boundaries drawn between, on the one hand, those political considerations to which it is proper for an Attorney General, a Director of Public Prosecutions or any Crown prosecutor, to have due regard and, on the other hand, those kinds of political considerations which should never be countenanced. Unless this basic line of demarcation is recognized and care exhibited in defining the meaning that is attributed to the term "politics" when discussing this central issue, confusion and misconceptions will continue to impede any progress towards solving the underlying problems.

The terms "politics" and "political matters", when invoked in association with the handling of criminal investigations or criminal prosecutions, inevitably generate suspicions as to the impartiality of the entire proceedings. Perhaps this should not be, but the public mind is often governed by irrational emotions coupled with a deep seated desire to see higher ideals prevail among those invested with enormous power over the lives of its citizens. If particular events are seen to foster this strange mixture of cynicism and hope, it is well that I attempt to clarify the relationship of politics to the criminal law. This relationship embraces not only the responsible minister, the Attorney General, but also those subordinate officials, including a Director of Public Prosecutions and the Crown prosecutors, who make decisions in the name of the Attorney General. When therefore I speak of the Attorney General my remarks extend to those who act in the name of the Senior Law Officer of the Crown. It may also touch upon the duties associated with the police and the courts.

Constitutional doctrine, deeply embedded in English parliamentary practice, dictates that anything savouring of personal advancement, of personal sympathy or hostility felt by an Attorney General towards a political colleague, political supporter or opponent, or which relates to the political fortunes of his party or the government in power, should not be tolerated if adherence to the principles of impartiality and integrity are to be publicly manifested. In short, the introduction of partisan politics into the criminal process is totally insupportable. The lessons derived from the famous Campbell *affair in 1924, which resulted in the downfall of the first Labour Government in the United Kingdom, are imprinted on the minds of*

every British parliamentarian, Attorney General, Solicitor General and every other minister of the Crown, as well as those who come to occupy the position of Director of Public Prosecutions. This does not, of course, mean that the Attorney General or the Director of Public Prosecutions should not have regard to political considerations in the non-partisan interpretation of the term "politics". Drawing this dividing line may be extremely difficult at times and I am the first to recognize that the interpretation of the relevant political considerations may well be a reflection of the political philosophy of the government of the day and of the law officers who are part of that government. Let me illustrate what I mean by legitimate political considerations. Included within this criterion I envisage situations where what is at stake is the maintenance of industrial peace and the necessity for having regard to the danger of exacerbating a labour dispute by invoking or not invoking the criminal law at a particular juncture. Other circumstances would embrace the exercise of judgment as to when and what steps should be taken to reduce strife between different ethnic groups. Yet another example would have regard for the maintenance of harmonious relations between sovereign states or on an inter-provincial level.

I fully recognize the difficulties in actually defining in advance what is meant by "the wider interests of the public at large", but I suggest that any problem the solution to which is capable of eliciting bi-partisan support is bound to come close to meeting the test of which I speak. Taking such soundings may be wholly impractical and I do not for one moment advocate inter-party discussions as a means of resolving the dilemmas that confront an Attorney General in office. What I do support is the propriety of an Attorney General or his agents having regard to these kinds of non-partisan "political" considerations when reaching decisions whether (or when) to initiate criminal proceedings and, an even more sensitive question, whether (or when) to discontinue a criminal prosecution once it has been launched. The attainment of universal approbation for the handling of these difficult problems is an unrealistic objective within any parliamentary democracy. Demonstrating, however, a conscious adherence to the principle that rejects any place for politically partisan considerations should be a basic tenet that pervades every action that involves the Attorney General and his representatives.

We in Canada - and the same pertains to Australia and New Zealand - are accustomed to seeing the incumbent Attorney General sit as a full member of the cabinet. There are those who maintain that this regular involvement with the resolution of the political

issues of the day is hardly conducive to generating confidence in the Attorney General's ability to distance himself from the partisan views of his cabinet colleagues when he is faced with making what are sometimes loosely described as quasi-judicial decisions. In these circumstances, if the right kind of constitutional principles are to be maintained, it may become necessary for the Attorney General to stand up against the first minister as well as his other cabinet colleagues in the event that they oppose his intended course of action. Such evidence as I have seen, from the federal and provincial parliamentary records in Canada, points towards the erroneous assumption that the doctrine of collective ministerial responsibility extends to prosecutorial decisions made by the Attorney General. If left unchallenged this would mean that the final decision-making power, even in controversial cases, rests with the cabinet, who can force the Minister of Justice, in his capacity as Attorney General, to conform to the will of the collective cabinet or else pay the constitutional penalty of resigning his portfolio. I know of no such sacrificial precedent in Canadian political history but in Australia, as recently as 1977, the then Commonwealth Attorney General, Robert Ellicott, resigned his office rather than be dictated to by the cabinet, who were insisting that he, as the Senior Law Officer of the Crown, take over and terminate a private prosecution launched against former Prime Minister Gough Whitlam and some of his ministerial colleagues. A full account of this extraordinary episode in Australian legal history is to be found in my recently published book "The Attorney General, Politics & the Public Interest " (1984). ((1987) 36 U.N.B. Law Journal 41 at pp. 46-49)

My attempts at distinguishing between legitimate political considerations and partisan political pressures when speaking of prosecutorial decision-making has led my colleague Philip Stenning to comment critically on the inadequacy of my treatment of this sensitive question. Writing as part of his doctoral thesis "Trusting the Chief: Legal Aspects of the Status and Political Accountability of the Police in Canada" (1983) Dr. Stenning has observed:

"While such a distinction appears to reflect a common sense view and is superficially attractive, however, it is not without its critics. In the first place, it presents a "consensus" view of politics which would not be shared by all political scientists. In this regard, it suggests that a clear distinction can be made between political decisions which involve "the wider public interest that benefits the public at large" and those which benefit "any single political group or factional interest". There are those who would argue, however, that all political organization necessarily results in structures which

benefit some groups more than others, and that even the most fundamental political decisions can be shown to be of greater benefit to some than to others... . Thus even those decisions which have the greatest appearance of consensus (e.g. laws passed by a representative democratic parliament) cannot necessarily be automatically characterized as "non-partisan", since they are almost invariably the product of a partisan political system in which one partisan faction (or a coalition of partisan factions) predominates and is able to implement its own policies. The distinction between partisan and non-partisan decisions according to this view, is not one of a kind but of degree, and relies heavily for its validity on the ability of the dominant political faction to convince the populace that the decisions it proposes to implement "involve the wider public interest that benefits the population at large". Under our constitutional system, however, the fact that they do not succeed in doing so does not, provided they act within the law, render their decision illegal or improper, although it may create real difficulties of political legitimacy which the dominant partisan faction may or may not be able to survive." (*op. cit.*, pp. 438-439)

Dr. Stenning is quick to acknowledge that whatever may be the correct view on this matter, there can be little doubt that the general proposition, as explained in my writings, has received a measure of acceptance as a recognized constitutional convention in Canada in recent years (see "Appearing for the Crown", p. 292).

I readily accept the difficulties in producing interpretations that produce infallibly correct distinctions in the real world of politics. What I have offered is more of a philosophical demarcation line that is intended to imbue the actors with the right kind of considerations when making decisions in individual cases. I do not contest the validity of the comment that "all political organization necessarily results in structures which benefit some groups more than others" or that "even those decisions which have the greatest appearance of consensus (*e.g.*, laws passed by a representative democratic parliament) cannot necessarily be characterized as "non-partisan", since they are almost invariably the product of a partisan political system in which one partisan faction (or a coalition of partisan factions) predominates and is able to implement its own policies."

Where the choice presented to the decision-maker (be it the Attorney General, a senior official in the department, the D.P.P. or a local prosecutor) involves the disposition of a particular case involving an individual accused, I believe the dimensions of the contrasting philosophies are likely to be so acute that the choice should not be blurred by reference to political organizations and partisan factions. What is at stake here is not the enactment of

legislation or the formulation of general policy statements. The focus is the sharpest imaginable and, if the decision maker is properly informed as to the contrasting approaches open to him, the justice system will be better served if the appearance of partisan influences are steadfastly rejected.

6.6 Accountability of the Attorney General to the Prime Minister, to the Cabinet, the Caucus and the Legislature

Prior to the introduction of the Charter of Rights as a major component of both the criminal law and constitutional law of Canada, the law reports were replete with decisions in which the judges recognized that the ultimate accountability of the Attorney General (and his agents) is to Parliament (or the legislature) and not to the courts (see Stenning, "Appearing for the Crown", pp. 324-329). The advent of the Charter, and the recognition by the Supreme Court in *Operation Dismantle* that henceforth even prerogative decisions by the executive branch are amenable to judicial review, has introduced a fundamentally new dimension to the scope of the Attorney General's accountability.

If that assessment is correct I suppose that I ought to dwell on this development at greater length. As I see it, however, the subject is not so germane to this Royal Commission's concerns as the longer established accountability of the Law Officers to the legislature and Parliament, as the case may be.[21] What I propose, instead, to concentrate upon is the exact scope of the accountability that is said to be owed by the Attorney General for every prosecutorial decision taken by himself or those who represent the Crown in the courts. Included within this review will be the extent of both the direct and explanatory forms of accountability owed by the Attorney General to the Chief Minister, the Cabinet, the party caucus and to the legislature.

Writing in 1964, with specific reference to the constitutional practice in England and Wales, I was concerned to stress that the Attorney General's claims to independence from Cabinet direction in the field of prosecutorial discretion could not be sustained in a vacuum. This special position of independence within the Executive's sphere of control must be directly related to the wider doctrine of ministerial responsibility, as practiced on the floor of the House of Commons or its legislative equivalent. And even in that forum there exist distinctive features peculiar to the Attorney General. Referring to the Law Officers' historic status of independence within the Executive branch of government I wrote:

"First, it is now well recognized that any practice savouring of political pressure, either by the Executive or Parliament, being brought to bear upon the Law Officers when engaged in reaching a decision in any particular case, is unconstitutional and is to be

21. To accommodate any pressing concerns on the part of this Royal Commission that may relate to judicial reviewability of the Attorney General's actions in the light of the Charter, see "The Attorney General and the Charter of Rights," one of a collection of papers in R.J. Sharpe (ed.) "Charter Litigation" (1987), pp. 45-68.

avoided at all costs. Acceptance of the first principle, however, in no way minimizes the complementary doctrine of the Law Officers' ultimate responsibility to Parliament, in effect the House of Commons, for the exercise of their discretionary powers. To be explicit, it is conceived that, after the termination of the particular criminal proceedings, the Attorney General or the Solicitor General, as the case may be, is subject to questioning by members of the House in the same way as any other Minister of the Crown. Like any other Minister they are answerable for their ministerial actions. The extent to which a Law Officer may feel prepared to give specific reasons for, and to disclose the evidence and other factors which led to his making his decision in the individual case will obviously vary according to the particular circumstances. What needs to be emphasized is the fact that example after example has already been noted in which the House of Commons has debated decisions made by individual Attorneys-General and Lord Advocates in respect to criminal proceedings. Though less clearly defined in the general statements of constitutional doctrine made from time to time by Prime Ministers and Attorneys-General, it is my belief that the principle of accountability to Parliament is of no less importance than the principle of independence now recognized as operating before the institution and during the continuance of a criminal prosecution." (Edwards, "The Law Officers of the Crown", 1964, pp. 224-225)

In my judgment, the principles enunciated in the above passage are equally applicable to both federal and provincial levels of government in Canada.[22] When speaking of the Attorney General's office in Canada, where the holder is, by tradition, automatically included within the Cabinet, it is important to distinguish between the principle of collective ministerial responsibility as it applies to the Cabinet (or the Administration) as a whole and the principle of ministerial responsibility as it applies to individual Ministers whose conduct of political office is the target of parliamentary attack by the Opposition.

Since I took a hard look at this controversial question when acting as Special Adviser to the McDonald Commission into the RCMP Security Service (1977-81) I may be permitted to invoke the views that I expressed on that occasion and to which I adhere. I argued as follows:

"Stress has been laid, earlier in this study, on the absolute necessity of isolating the making of decisions in this area of the Attorney General's powers from any direction that might be exercised on the part of the Prime Minister, any or all of the members of the Cabinet,

22. I have elsewhere explored the different meanings that can be accorded to the constitutional theory of ministerial responsibility (see Edwards, "Ministerial Responsibility for National Security", 1980, Chap. 11, pp. 77-87) and I would refer you also to the full treatment of this subject by Dr. Geoffrey Marshall, Queen's College, Oxford in "Constitutional Conventions - The Rules and Forms of Political Accountability", 1984, see esp. pp. 54-66, 77-79, 111-119.

or even Parliament itself. What then, it might be argued, does the acceptance of this principle do to the concept of collective responsibility?... Is it acceptable to the Attorney General's ministerial colleagues in the Cabinet (using the Canadian and not the British model of Cabinet membership) that decisions which are capable of triggering high visibility political repercussions, which may seal the fate of the entire Administration, should be made unilaterally by one of their members, and at the same time expect the Government as a whole to bear collective responsibility? In answering this question it matters less that the Attorney General has consulted with his ministerial colleagues, either on his own initiative or that of his fellow members in the cabinet, than the recognition that the ultimate decision as to prosecution rests in the personal hands of the First Law Officer of the Crown. Inherent in the latter principle are two related propositions, first, the Attorney General is saddled with personal responsibility for the decisions that he makes or which are made on his behalf under delegated authority, and, secondly, the doctrine of collective responsibility should not be invoked to involve the Government as a whole with respect to decisions pertaining to criminal prosecutions." (*op. cit.*, pp. 84-85)

My colleague, Dr. Stenning, has taken firm issue with my rejection of collective responsibility as it might be invoked in highly sensitive political decisions made by the Attorney General. Accordingly, let me first elaborate on my own position and then ensure that my critic's views are sufficiently presented. I have no illusions about the many weaknesses in the doctrine of ministerial accountability that must be readily apparent to any serious observer of the political scene in Canada. This is particularly so with reference to the practical effectiveness of the legislature's power to compel the resignation of an individual Minister. Such weaknesses, I would argue, are not inherent in the parliamentary system. Instances drawn from many parts of the country, including the Nova Scotia legislature, can be recalled in which well informed critics have demonstrated their ability and determination to exact the fullest measure of public accountability from the Attorney General in office at the time. If, at other times, the doctrine of accountability is quiescent or appears to have been neglected, the fault should not be laid at the door of this vital principle of our constitution but to whatever combination of personal and political factors that regulate the daily conduct of M.P.'s and M.L.A.'s.

The essence of my approach to sustaining the compatibility of the two equally fundamental principles of independence and accountability is contained in the same study that was prepared for the McDonald Commission, where I stated:

"A more difficult question would arise where the independent exercise of the Attorney General's discretion was perceived, rightly or wrongly, by the Prime Minister as casting doubt on the quality of the Law Officer's judgment. The proper place for questioning the Attorney General's judgment in a particular case is the House of Commons. That this forum and its equivalent in the provincial legislatures have shown themselves, in the past, to be lacklustre in the pursuit of questionable decisions by the Law Officers of the Crown is hardly open to denial. Neither is the observation that on such occasions a mood of party solidarity and partiality often pervades the debates. Unless, however, we are prepared to discard altogether the doctrine of ministerial accountability to Parliament it might be rather more profitable to seek ways and means of ensuring that our elected representatives achieve a better grasp of what is at stake in calling the Attorney General to explain and justify his actions at the bar of public opinion. Any move to dispense with the services of an Attorney General who, by virtue of his prosecutorial decisions, has lost the confidence of his caucus, his Cabinet colleagues or, even more importantly from the practical point of view, the Prime Minister, will almost certainly become a public issue. Moreover, as in the recent situation in Australia where the Commonwealth Attorney General, Robert Ellicott, tendered his resignation on the grounds of what he regarded as improper pressures by his Cabinet colleagues with respect to the disposition of the private prosecution of the former Prime Minister Gough Whitlam, and other former Ministers, it makes little difference whether the Attorney General's resignation is called for by the Prime Minister or is tendered on the initiative of the incumbent himself.

In the current state of public understanding of the constitutional principles involved in this kind of situation, it is readily acknowledged that acceptance by an Attorney General of the full import of the doctrine of personal responsibility for his actions may be the only effective instrument by which the special independence that attaches to the office of Attorney General in our system of government can be secured. To argue for the adoption of the contrary principle whereby the more sensitive questions affecting criminal prosecutions are accepted as a normal part of Cabinet deliberations, giving full rein to the introduction of extraneous

factors including the political interests of the party in power, is to assail one of the central supporting arms of our independent courts. What is at stake is the quality of justice that society aspires to see achieved in its name, the same tenet by which the duties of the presiding judge and the rules of evidence and procedure govern the conduct of a criminal trial. The thought of permitting the introduction of party political considerations into the trial of a criminal case is abhorrent and rejected out of hand. So, I would argue, should be the approach to permitting the Cabinet to become directly involved in the making of decisions governing the institution or withdrawal of criminal prosecutions. In short, the doctrine of collective ministerial responsibility should have no place in the machinery of prosecutions." (*op. cit.*, pp. 86-87)

In his admirable book "Appearing for the Crown" (1986), Philip Stenning has argued that in some circumstances there is a need to recognize the existence of political accountability by the Attorney General to his Prime Minister (or Premier) and the Cabinet, even if it is only *ex post facto* accountability as I have defined the scope of his accountability to Parliament or the legislature. Stenning contrasts this interpretation with my own "radical position" which he correctly summarizes as dictating the necessity for ruling out any political accountability to the Cabinet if the principle of independence from direction or control by the Cabinet is to be sustained. Underlying Dr. Stenning's theory of the Attorney General's position vis-à-vis the Cabinet is a straightforward interpretation of accountability in terms of obligation, of being required to give an account, but with the all powerful sanction, hovering in the background, of liability to be dismissed if the principle is violated. Stenning rules out political control of the Attorney General's decisions by his Cabinet colleagues but seeks to establish the Cabinet's right to dismiss or to bring about the removal from office of the Attorney General if he exercises his prosecutorial authority in a way which does not find favour with the government of the day. According to Dr. Stenning:

"Such liability to dismissal, if it is the true position, ...constitutes a most significant element in the relationship between an Attorney General and his Cabinet and despite Edwards' assertion to the contrary, might easily be thought by some to represent a "weakening of the Attorney General's position" of independence in relation to the Cabinet... While the recognition of a simultaneous accountability to Cabinet and independence from political control by it presents no particular problems in principle, it must be recognized that its implementation in practice is liable to be fraught with difficulty... One might expect that only in the most extreme case

would an Attorney General be willing to sacrifice a political career in the interests of preserving the independence of his office. Such cases could be expected to be rare indeed, and the author knows of no such case in this century in Canada. In practice, therefore, the independence of an Attorney General from political control or direction by his cabinet, if it exists at all, may be considerably less expansive than it is recognized to be in theory." (*op. cit.*, pp. 295-296)

It would be easy to reject this analysis on the ground that its premise is constitutionally ill-founded. Given the fact that the ultimate sanction of demanding the resignation of a recalcitrant minister, or a minister who has become a political liability, rests squarely in the hands of the Prime Minister or Premier, as the case may be, it is totally erroneous to claim that this power rests in the hands of the collective Cabinet. Constitutional theory, as Dr. Stenning himself acknowledges (*ibid.*, p. 295), places this power to appoint and to dismiss within the unrestricted discretion of the Chief Minister. It would be wrong, nevertheless, to give this statement of principle too literal or automatic an application. Once the "realities" are given play it becomes necessary to consider not only the collective opinion of the Cabinet but also that of the party caucus, without whose support no Prime Minister can prevail for long. In determining, therefore, the accountability of an Attorney General when defined in terms of his liability to be dismissed for a controversial decision, Dr. Stenning's theory must be expanded to encompass the party caucus as well as the Cabinet. There is no need to press the argument further to include the "grass roots" of the party from which the Administration (the Premier and his Cabinet) derives its popular support among the electorate. But I would argue that once the Attorney General's independence is qualified by the need to ensure that he has the confidence of his ministerial and political colleagues, this matter of confidence can quickly transform itself into a test of the measure of popular support for the Attorney General's actions.

The dangers of diluting the principle of independence of the Attorney General from direction by the Cabinet, by qualifying it to allow for the Cabinet's right to insist on an *ex post facto* justification of the Attorney General's actions, is but the beginning of a slippery path that will first see the *ex post facto* condition being removed in the secrecy of the Cabinet's deliberation. More dangerously, it will result in every Attorney General looking over his shoulder to assess the party political ramifications of his decisions as reflected in the judgment of his Cabinet and caucus colleagues. Nothing could be more insidious in weakening the constitutional principles that I have

explained earlier and which require any sensible Attorney General to consult widely but, under no circumstances, to place himself and his office in a position where he must conform to the dictates of his political colleagues, be it in the Cabinet, in the party caucus or in Parliament itself.

6.7 Conclusions

(i) In seeking an understanding of how successive Attorneys General in Nova Scotia have viewed their role and responsibilities it is necessary to separate the theories from the practices of the Department presided over by the First Law Officer of the Crown. Protestations of adherence to British constitutional precedents have not always been followed through. On the other hand, there is ample historical evidence of the province's reliance upon the constitutional conventions and customs that had prevailed before the new Dominion was brought to existence in 1867.

(ii) A review of the *Public Service Act* provisions which describe the "functions, powers and duties" of the Attorney General are not all encompassing. A number of general elements, important to an understanding of the constitutional position occupied by the Attorney General, are not legislatively prescribed. It is with these elements that the present opinion is mainly concerned.

(iii) With a continuity that is traceable back to the earliest days of responsible government in Nova Scotia, the selection of the Attorney General has always been dependent on the appointee being elected to the provincial legislature. In addition to discharging the normal duties of representing his constituents, the Attorney General, as a Minister of the Crown, is accountable to the legislature for the exercise of his particular portfolio. The Attorney General of Nova Scotia has always been subject to the same form of parliamentary supervision as that which applies to other members of the Administration.

(iv) Note is taken of one major difference in constitutional practice between Nova Scotia (and the rest of Canada) and the United Kingdom. Since 1928 the Attorney General of England and Wales has been excluded from membership in the Cabinet. The reason for this move is the belief that exclusion from the Cabinet enhances the public understanding of the Law Officers' independence from political direction in the discharge of their prosecutorial functions. The Attorney General, however, often attends meetings of the Cabinet and is a standing member of several important Cabinet committees. Although excluded from the list of Ministers who constitute the innermost circle of policy makers within the executive

branch, the English Attorney General is part of the Government and has to vacate his office if the Administration changes hands.

(v) From time to time the question is raised, should the office of Attorney General be changed into a public service appointment? As I have previously pointed out, such a model exists in certain countries of the Commonwealth. Underlying the arguments in favour of such a change are the doubts about a system in which an active politician and member of the Cabinet is entrusted with the ultimate powers of direction over public prosecutions. These criticisms were given authoritative expression by Sir Hartley Shawcross, a former Labour Attorney General, in the wake of the ruling by the House of Lords in the *Gouriet* case (1978). Shawcross voiced the arguments in favour of converting the office of Attorney General into a non-political, public service appointment, with the holder enjoying the status and independence of a Judge.

(vi) Not even the rumblings of a prospective change in the character of the Attorney General's office, however, are discernible in Britain. My own rejections of the Shawcross proposal are two-fold. Based on my first-hand familiarity with most of the Commonwealth jurisdictions, including countries which have adopted the non-political Attorney General option, I am persuaded that the correct qualities of independence and impartiality are more a matter of personal integrity and understanding of what the office demands of its incumbent than a derivation from any particular constitutional model. The other objection I have to the non-elected Attorney General is the need to ensure that the principle of ministerial accountability is fully maintained. If the office of Attorney General becomes a part of the public service there will still be the need for a Minister of Justice (or some equivalent title) with all the attendant questions of accountability and independence in defining their inter-relationship.

(vii) The differing theories as to the extent of the Attorney General's independence from Cabinet control and direction are canvassed. The English Campbell case in 1924 is seen as the turning point and its ramifications are spelt out at some length. Only recently can it be said that Canadian constitutional practice has adhered to the principles associated with that episode. Basically, as expressed by a number of recent holders of the office of Attorney General in Canada, both federal and provincial, the Attorney General is free to seek advice from any quarter, including his Cabinet colleagues, but the final decision in all prosecution matters rests in the hands of the Attorney General alone. The classic statement on this controversial

subject by Shawcross in 1951 is quoted in full and its implications considered within a Canadian context. It would be rash to conclude that the modern day pronouncements by several Attorneys General of Canada and of Ontario represent constant adherence to the British constitutional convention. Recent events in Nova Scotia dictate a note of caution in assessing where the vaunted independence of the Attorney General presently stands in at least one province.

(viii) Representative extracts from Dr. Stenning's writings and my own are included for the purpose of enabling the Commissioners to determine which side of the academic debate correctly represents where the constitutional law of Canada stands on the scope of the Attorney General's independence when exercising his discretionary powers in the area of prosecutions.

(ix) Tied in with that debate is my rejection of the doctrine of collective responsibility by the Cabinet for prosecutorial decisions made by the Attorney General in what are, or turn out to be, highly political circumstances. If the circumstances are exceptional, and something akin to the "national interest" is involved, Dr. Stenning would favour the Cabinet becoming responsible for making the decision whether or not to prosecute. For my part I hold to the principle of personal responsibility on the part of the Attorney General, subject always to his right, and duty if necessary, to consult on the widest possible basis before reaching his ultimate decision. The impact of the Charter of Rights is noted in those situations where the prerogative power of the Attorney General infringes one of the entrenched rights and is the subject of a challenge in the courts.

(x) Dr. Stenning emphasizes the Attorney General's accountability for his decisions *ex post facto* to the Chief Minister and to his Cabinet colleagues. Theoretically, of course, every Minister is ultimately subservient to the political authority of the Prime Minister or the Premier, as the case may be. This fact of political life should not be exaggerated when interpreting the expectations demanded of the person occupying the position of Attorney General. In my opinion, the public good will not be served if the Attorney General is obliged to constantly look over his shoulder and to assess the party political ramifications of his decisions. Even more objectionable would be the adoption of a principle wherein the Attorney General of the day, if faced with opposition to his proposed course of action, must conform to the dictates of his political colleagues, be it in the Cabinet, in the party caucus or in Parliament itself.

May 19, 1988

VII
The Future Role of the Office of Attorney General in the Province of Nova Scotia: Part 2 - Determining its Relationship to a Statutory Office of Director of Public Prosecutions and to Every Crown Prosecutor

7.1 Introduction

It is quite apparent that, subject to any constitutional limitations that obtain in the criminal law field, the Nova Scotia legislature is empowered to expand or restrict the particular powers and duties of its Attorney General. If such legislation is deemed to be necessary, great care must be taken to define clear lines of responsibility and reporting relationships between the Attorney General and other pertinent government officials. This is the path to follow if the Province is to avoid future conflicts on the critical questions of independence and accountability. In determining whether or not any state official should have conferred upon him independence when making decisions within the scope of his legislative or executive authority, the same careful regard must be paid to the language that is used to confer that authority.

When looking at this question in the context of a Director of Public Prosecutions, or that of the ordinary Crown attorney, different answers can be confidently predicted according to which choice of words is resorted to by the legislature. I have referred, in the course of my previous opinions, to the particular formulae that other jurisdictions have chosen to define the status and discretionary powers of its Director of Public Prosecutions and those of its Crown prosecutors. At the centre of all these statutory formulations is the redefinition of the authority of the Attorney General. What I propose to do, therefore, in the course of this opinion, is to review the respective legislative definitions of these central relationships and to offer my own judgment as to which option should be recommended for adoption by the Nova Scotia legislature. This judgment, as will have become readily apparent from my earlier memoranda, will be dictated by my concerns to ensure that in conferring upon any office holder the maximum degree of independence when making prosecutorial decisions there is a simultaneous regard for sustaining the principle of ministerial accountability.

7.2 "Subject to the directions and/or control of ..."

This form of words leaves no doubt as to the subordination, in terms of theoretical direction, of a Crown prosecutor to his superior, whether that official is the Attorney General or the Director of Public Prosecutions. The same conclusion is applicable if the above formula is used to describe the statutory relationship between the Director of Public Prosecutions and the Attorney General. Both in relation to setting general directives as to how discretionary powers are to be exercised and in the giving of specific directions with respect to the handling of an individual case, the ultimate authority rests with the senior official concerned. As we have seen, however, recognition of the source of final authority does not imply an obligation to constantly assert that authority by intervening and giving directions

as to the handling of individual cases. Rather there should be an emphasis on avoiding involvement in the day-to-day running of the subordinate office. This in no way diminishes the recognition as to which office carries with it the ultimate authority to prevail in terms of making the final decision and seeing that that decision is carried out. I intend to revert to this subject later, with special reference to the role expected of the local Crown prosecutor.

If the intention is to deliver a strong vote of confidence in the prevailing prosecution machinery in Nova Scotia, the simplest route to follow would be to include in any proposed legislation a section providing that every Crown prosecutor, including a statutory or non-statutory Director of Public Prosecutions, is to exercise his duties subject to the unqualified direction and control of the Attorney General. My response to this option is an emphatic rejection of all its implications. To subscribe to this alternative, in the terms just described, would destroy everything that this Royal Commission has engaged in since it began its public examination of the administration of justice in Nova Scotia and what went wrong with the handling of the *Marshall* case. Fundamental changes are called for in Nova Scotia and these cannot begin to be realized if the Attorney General, and the Department for which he is responsible, are permitted to resume functioning in the same old ways that contributed to the errors and faults fully documented by this Commission.

Outwardly, at least, it may seem incongruous that in rejecting this first option I should simultaneously countenance the office of Attorney General in Nova Scotia remaining as a political office, with the holder being a member of the Government and *ipso facto* a member of the Cabinet. As I see it, this is not a question of not wishing to disturb the traditional character of the office in Nova Scotia. If the arguments were persuasive that a fundamental change is called for in eliminating the political dimensions of the office I would be disposed to see the Attorney General of Nova Scotia join those countries which have elected to make the office a public service appointment.

As I have previously argued, however, such a change would necessitate the creation of a Minister of Justice (or any similar title) who would become the nominated Minister of the Crown charged with overseeing all aspects of the administration of justice in the province. With the recent establishment of a Department of the Solicitor General, as part of the Government of Nova Scotia, the division of responsibilities between the two Ministers would, of course, have to be taken into account. The basic objection that I have previously registered to the appearances of fundamental reform in depoliticizing the office of Attorney General is that any such action must take into account the consequences that would derive from an

abandonment of the doctrine of ministerial accountability. And this is not a price that I would urge the Commission to accept as the best solution to all the problems associated with the present machinery of justice in the province.

7.3 "Under the superintendence (or supervision) of ..."

In another earlier opinion, devoted to the British experience, I examined at some length the resort to the concept of "superintendence" in defining the relationship between the Attorney General of England and Wales and the Director of Public Prosecutions in that jurisdiction. Without the historical background that illuminates the true meaning of ministerial superintendence over criminal prosecutions in England and Wales, it could well be argued that the generality of the concept of supervision presupposes that attention should be limited to providing guidance of a general nature. This interpretation would mean that general guidelines were properly within the domain of the Attorney General or the D.P.P., as the case may be, but there the boundaries are set and any attempt to become involved in the handling of individual cases must be resisted as exceeding the statutory authority comprehended in the concept of superintendence.

It is for this reason that I am hesitant to recommend the adoption of the criterion of "superintendence" in any future Nova Scotia statute that purports to define the relationship (i) of the Attorney General to the Director of Public Prosecutions and (ii) the D.P.P. to the individual Crown attorneys. There does not exist anywhere in Canada the constitutional understandings that enable the English Attorney General and the English D.P.P. to function smoothly and cooperatively under the "superintendence" formula. It is, however, significant that in the British *Prosecution of Offences Act, 1985*, the enactment speaks of every Crown prosecutor having "all the powers of the Director as to the institution and conduct of proceedings" but those powers are to be exercised "under the direction of the Director" (s. 1(6)). So far as the constitutional relationship between the Attorney General and the D.P.P. in England and Wales is concerned, I refer you again to the authoritative exposition contained in Sir Michael Havers' prepared statement to the House of Commons on December 13, 1979, when the Attorney General declared:

"My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense that I am answerable in the House for what he does.

Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship with him is such that I require to be told in advance of the major, difficult, and, from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction."

Were the present Attorney General (Sir Patrick Mayhew) to be asked to interpret the significance of the changes incorporated into the *Prosecution of Offences Act, 1985*, I am confident that the governing principle would remain that:

"The Director still carries out his duties under my superintendence and I still have the power to direct in particular cases." (loc. cit.)

When assessing how far the English concept of "superintendence" will suffice to demonstrate the qualities of independence deemed to be necessary in a new statutory office of Director of Public Prosecutions in Nova Scotia, the Commissioners may feel, as I do, that reliance on British constitutional understandings, without more, is an inadequate answer to overcoming the problems associated with the administration of justice in Nova Scotia.

7.4 "Responsible to the Attorney General for the due performance of his functions under this Act or any other Act"

This formula, it will be recalled, was resorted to in the legislation that in 1982 established the first office of Director of Public Prosecutions in the State of Victoria. Since that pioneering reform was introduced in Australia the main outlines of the Victorian enactment have been replicated in Queensland (1984) and New South Wales (1986). Some of the implications of thus expressing the relationship between the D.P.P. and the State's Attorney General were examined in my earlier opinion focussing on the Australian experience. A fuller analysis is called for and will be undertaken later, in the course of which I intend to offer my judgment as to the strengths and weaknesses of the respective approaches reflected in the Commonwealth of Australia statute and that adhered to in the Victoria, Queensland and New South Wales legislation. I propose to do that at the conclusion of this comparative survey, at which time it will have become clearer why I believe the Australian initiatives contain the insights necessary to a solution of the Nova Scotia situation.

For the moment I merely want to stress one simple point. Again, by way of repeating myself, I noted in my "Australia" opinion that the first holder of the new D.P.P.'s position in the State of Victoria went to some lengths, in his public statements, to differentiate the

status of the Victoria Director of Public Prosecutions from the corresponding office as it has existed over the past 100 years in England and Wales. "I doubt", the new Director claimed,"that the English D.P.P.'s office has been reflected in my office at all. I have no doubt that my English counterpart is an independent officer, but his formal arrangements don't support an independent status. He's answerable by regulation to the Attorney General in all matters, even in the selection of counsel ...". This assessment, made in 1984, has already been overtaken by the changes contained in the British *Prosecution of Offences Act, 1985*. The reference to the English D.P.P.'s answerability "by regulation" to the Attorney General is an obvious pointer to the famous Regulation 5 in the 1946 Regulations governing the D.P.P.'s office. Its elimination from the English statute book has not materially altered the statutory relationship of the D.P.P. to the Attorney General, and the implied attribution of a higher level of independence to the office of D.P.P. in the State of Victoria must be judged not by the claims of the occupants of that office but by the language used to describe the level of accountability that is attached to the office.

Another jurisdiction that once entertained the adoption of the statutory formula "the Director of Public Prosecutions shall be responsible to the Attorney General for the due performance of his functions" was Northern Ireland, prior to the imposition of direct rule in 1972. Explaining the meaning of this relationship, the Attorney General of Northern Ireland stressed the fact that virtual independence would be conferred upon the Department of Public Prosecutions in deciding whether criminal proceedings should or should not be brought. The only exception would be those cases in which, by statute, the consent of the Attorney General was a pre-requisite. In those cases provision was made for ensuring that, if the Attorney General decided to intervene and substitute his decision for that of the D.P.P., such action would have to be done publicly thus underlining the true ambit of the doctrine of ministerial accountability.

Within the space of the few short months that separated rule by Westminster from rule at Stormont the statutory formula governing the status of the office of Director of Public Prosecutions in Northern Ireland was noticeably changed, and it is hard to resist the conclusion that an important change of policy was involved in the different language used to circumscribe the authority of the head of the new prosecution service in Ulster. Thus, in the Prosecution of Offences (N.I.) Order 1972, which quickly received affirmation by both Houses of Parliament in Westminster, and which continues to apply at the present time, we find the former standard of accountability changed to read:

"...[the Director] shall discharge his functions under the superintendence of the Attorney General in all matters including the filing or withholding of any such consent as is mentioned in Article 7 of [the 1972] Order."

What conclusions can we draw from this brief review of the statutory definitions chosen, by the Stormont and Westminster Parliaments, respectively, to express the levels of independence and control that should be attached to the office of Director of Public Prosecutions in Northern Ireland? Clearly, the United Kingdom Government made a deliberate choice in discarding the language of "responsibility to the Attorney General for the due performance of his functions" and in substituting the alternative standard wherein the D.P.P. "shall discharge his functions under the superintendence of the Attorney General in all matters...", thereby achieving uniformity in the sense of declaring the English Attorney General's ultimate power of direction and control in all prosecution matters. That having been said, it is always necessary to be reminded, yet again, of the equally important distinction that permeates every authoritative analysis of the English offices with which we are concerned, *viz.*, that however unqualified the language may be in describing the *de jure* power of direction it is essential to see this as entirely consistent with the delegation of the maximum amount of *de facto* independence.

7.5 "The Director shall be independent in the performance of his functions"

Exemplifying this approach, in the most literal sense, are the constitutions of Jamaica and Guyana, and the *Prosecution of Offences Act, 1974* in the Republic of Ireland. The experience of those jurisdictions which have chosen this route is surprisingly positive. In addition, I found little real concern in these countries for the absence of any practical form of accountability to the legislative assembly. What was emphasized to me was the record of the Director of Public Prosecutions discharging his duties in a manner that reflected the public's expectations of incorruptibility and impartiality. Unanswered in this kind of experience is the question what is to be done if the "independent" D.P.P. makes decisions that forfeit public confidence? Geoffrey Marshall, in his valuable monograph "Constitutional Conventions - The Rules and Forms of Political Accountability" (1984), has expressed his concerns about the notion of an "independent" Director of Public Prosecutions within the context of the English parliamentary system.

Before looking at Dr. Marshall's analysis of this important subject, a word of caution may not be amiss. Whatever view is taken of the D.P.P.'s office in England and Wales it should not automatically be linked with the examples given at the beginning of this section. The

constitutionally entrenched offices in Jamaica and Guyana, and that contained in the Republic of Ireland legislation, use explicit language to confirm the independence of the Director both in relation to the Attorney General and to every other branch of government. No such language is to be found in the series of enactments that describe the status of the English office of Director of Public Prosecutions. In interpreting Dr. Marshall's ensuing exposition, care must be taken not to elevate claims that might substantiate the *de facto* independence of the D.P.P.'s office in England and Wales into characterization of the same office as being *de jure* independent in the fullest sense of that description.

Appropriately, Marshall approaches the question of independence by way of the related doctrine of accountability. He writes:

"Supporters of the present arrangements would, however, certainly object to the absence of full-scale direct answerability to Parliament entailed in the appointment of a non-political prosecutor exercising all the present powers of the Attorney General... Suppose (it may be said) that a non-political, independent prosecutor is appointed and he then makes a decision which is alleged to be `a disgrace to our system of government and to our judicial system'... Suppose that he refrains from pressing prosecutions against offenders on the grounds that their offences have been condoned and encouraged by Ministers, or that their accounts are too complicated or that they cannot easily be found. Suppose that he prosecutes under outmoded statutes, offers immunities from prosecution to the wrong people or undermines the jury system. Shall we not want somebody acting on our behalf to tell him to stop doing it or start doing something else? Is not the loss of such an opportunity (it may be asked) too high a price to pay for the possibility of securing his immunity from political influence?

To this the reformer may reply that the existence of an independent prosecutor is compatible with debate in the House of Commons. The decisions in both the Rhodesian sanctions case and the Thorpe prosecution were in fact taken by the Director of Public Prosecutions, under an arrangement with the Attorney General. In the House of Commons, Sir Michael Havers said of the Rhodesian sanctions decision that it was the D.P.P.'s, but that, since he agreed with it, he accepted equal responsibility with the D.P.P. He also accepted his own responsibility to answer in the House for the D.P.P.'s decision. It is clear, however, that there cannot be shared accountability in the direct executive sense for a decision which has been delegated to the D.P.P. All that the Attorney General can in that case be accountable to the House for, is his decision to remit

the question to the D.P.P. Where a decision is under present law given by statute to the D.P.P. - as in many cases it is - the Attorney General's existing responsibility for the Director's actions is in any event only explanatory and indirect. If all, or the majority of, prosecutorial decisions were transferred by statute that would be true more widely. But it would not prevent the Attorney General being fixed with explanatory accountability. It is a nicely balanced point. The question is whether anything that the House of Commons in practice now has would be lost and whether the decisions of a non-political prosecutor would be less likely to be, or be felt to be less likely to be, influenced by the views, ideology and convenience of the government in power. Perhaps in relation to decisions in the field of industrial relations and public order they would be." (*op. cit.*, pp. 116-117)

Dr. Marshall's differentiation between what he describes as "accountability in the direct executive sense" and "explanatory accountability" is developed more fully in the same work (see pp. 78-79, 115-117). At first glance, the distinction appears to be quite helpful in describing the nature of the customary expectations of the British House of Commons when questioning the Attorney General as to the exercise of his prosecutorial powers. It matters not whether this involves a decision to institute proceedings, not to proceed at all or to terminate a prosecution after it has been launched. What is customarily being sought is an explanation of the background to the case and a sufficient statement of the reasons behind the decision from which Parliament can make its own assessment of the Attorney General's personal handling of the situation or that of a prosecutor for whom the Attorney General is the responsible Minister of the Crown.

Where I depart from Geoffrey Marshall's analysis is his assumption that the form of accountability will vary according to whether the Director of Public Prosecutions has been given full delegated powers or not. Marshall envisages such a transfer of full delegated power as derivable from either a deliberate decision by the Attorney General to do so in an individual case (as in the celebrated prosecution of Jeremy Thorpe in 1978, see Edwards, "The Attorney General" pp. 52-57) or by the conferment of specific authority upon the D.P.P. by statute in what are generally categorized as "consent" cases. The present situation in English law can rightly be described as a morass (see Edwards, *op cit.*, pp. 13-29), but this in no way colours the underlying problems of adopting Dr. Marshall's conclusions. For our present purposes these questions are not assignable away on the ground that they are being examined in the British (not the Canadian) parliamentary setting. The same issues

will one day inevitably surface whenever a Canadian Attorney General is called to account before Parliament or a provincial legislature.

What I find troublesome with Dr. Marshall's thesis is the suggestion that the two forms of accountability are in direct contradistinction with each other. The labelling of the exercise described in the preceding paragraphs as "explanatory accountability" should not conceal the possibility that what is revealed to the legislature by the Attorney General may prompt the invocation of "direct executive responsibility" on his part as the Minister of the Crown with the authority to approve or to forbid the actions taken by the Director of Public Prosecutions. At one point in his treatment of the subject of accountability, Dr. Marshall appears to exclude *any* application of what he describes as direct executive accountability in the area of public prosecutions where, as he puts it, "special and delicate problems arise from the need to balance public accountability and independence" (*op. cit.*, p.78). To suggest that in the entire field of public prosecutions the Attorney General may be protected from direct executive accountability is unsustainable. Explanatory accountability is ever present when questions are asked of the First Law Officer of the Crown. This, in itself, cannot prejudice the right of Parliament to enforce, in exceptional situations, either directly or indirectly, what is the implied ultimate sanction attached to executive accountability.

My second objection is to Dr. Marshall's assertion that in those instances where Parliament has entrusted to the Director of Public Prosecutions, rather than the Attorney General, the power to consent (or not to consent) to a prosecution, the Director is thereby free to act without reference to the Attorney General. This, in my opinion, does not accord with the overriding formulation of the Director's position as contained in the Prosecution of Offences series of statutes since 1879 (see Edwards, "The Attorney General", pp. 5-11). Writing with specific reference to Sir Thomas Hetherington's (the former English D.P.P.'s) assertion that in Director's "consent" prosecutions he was entitled to give or withhold consent without reference to the Attorney General, I have argued:

"It is undoubtedly true, as the present Director claims, that the majority of cases dealt with by his Department are never seen or heard of by the Attorney General. What is open to objection, if that indeed were intended, is the assertion that in cases subject by statute to the Director's fiat the Attorney General is functus officio *since the Director is entitled to give or withhold his consent without reference to the Attorney General. It does not contribute to an accurate understanding of the Attorney General's powers in these*

situations to claim that the vast majority of cases dealt with in the Director of Public Prosecutions' Department are never brought before the Attorney for his attention. What is important to recognize, as [Sir] Theobald Mathew [D.P.P. 1944-64] publicly acknowledged, is the supreme authority vested in the Attorney General to intervene and countermand any preliminary decision reached by the Director in a consent case, notwithstanding the apparent exclusive jurisdiction conferred by statute on the Director in his own right by the pertinent statute." (Edwards, *op. cit.*, p. 47)

To sum up this discussion, there is a real danger in talking abstractly about independence, whether it is in connection with the Office of Attorney General, the D.P.P. or the Crown prosecutor located away from the centre of government. What has to be studied, before drawing any conclusions, is the language of the enactment which defines the powers and duties of the respective state officials. The legislation, in all likelihood, will shed light on the legal dimensions of the reporting relationships, the right to direct, if any, and the degree of independence, if any, conferred by the legislative body. Alongside this exercise of determining what conclusions can be derived from the statute law, it is no less essential to discover what goes on in the daily communications between the respective offices. Neither the legal provisions nor the factual realities can be relied upon alone. Both perspectives must be taken into account, remembering that, in the crunch, it is from the statute law (or to the constitution in those countries which have entrenched provisions regulating the system of prosecutions) that final enlightenment must be sought.

7.6
Delineating the boundaries of Crown prosecutors' discretionary powers; or should every Crown prosecutor be regarded as an "independent, quasi-judicial officer"?

Up to this point I have been concentrating very much on the inter-relationships between the office of Attorney General and that of the Director of Public Prosecutions. The explanation for this emphasis must be quite apparent by now. I am of the view that the biggest change called for in Nova Scotia, and other Canadian jurisdictions, is the establishment of a relatively independent Director of Public Prosecutions. Before fleshing out some of the finer details of any such change in the provincial justice system I want to turn next to the no less central role expected of the province's Crown prosecutors. Across Canada the cry has often been heard claiming that each Crown prosecutor (or Crown attorney) should be regarded as an independent officer whose discretion and decisions in individual cases should not be fettered or interfered with by the Attorney General or by senior officials in the Department of Attorney General. In Alberta, the body of Crown prosecutors recently formulated their

"demands" in the form of draft legislative proposals part of which read as follows:

"The Attorney General shall not directly or indirectly be involved with or in any way interfere with any of the procedures relating to an individual prosecution.

Notwithstanding the generality of Subsection (2) the Attorney General may communicate his views and recommendations pertaining to an individual prosecution to the Director of Public Prosecutions where the matter involves an issue or question of vital concern to the public interest at large and to the fair and effective administration of justice in the Province."

There appeared to be no dispute in that province with respect to the Attorney General's right and duty to "determine the general policy governing the manner in which prosecutions, or a class thereof, are to be conducted by Crown Attorneys through the Province". The nub of the debate centered around the handling of individual prosecutions. This included the institution, continuation and termination of criminal proceedings. Especially with regard to the staying of a prosecution, it is unclear to me as to how the terms of a provincial statute can effectuate a statutory barrier to the *Criminal Code's* confirmation of the Attorney General's historic right to enter a *nolle prosequi* in proceedings on indictment (s. 579) and the extension of that right to direct a stay in summary proceedings (s.797). With the amendments enacted in 1985 the former s. 797 has been repealed with its provisions integrated into the former s. 579. As presently formulated, s. 579 of the Code now covers both summary and indictable proceedings.

I approach this important problem, of delineating the exact boundaries of the Crown prosecutors' alleged "independence", from three separate contingencies:

(i) where there is no Director of Public Prosecutions;
(ii) where there is a Director of Public Prosecutions but the office has no statutory basis or authority; and
(iii) where there is a statutory office of Director of Public Prosecutions with express powers and functions.

(i) and (ii): *Where there is no Director of Public Prosecutions or, alternatively, where there is a D.P.P. but the office has no statutory basis or authority.*

For our present purposes, both of these contingencies bring the same perspective to the resolution of the question, what limitations, if any, should be countenanced with respect to the D.P.P.'s authority to intervene in an individual prosecution? Another way of expressing the same problem is to ask what degree of independence should be attached to the Crown prosecutor's handling of individual cases in the situations described in (i) and (ii) above? This subject, to my personal knowledge, has been heatedly debated among the Crown attorneys of Ontario for the past 25 years and probably longer. The same is probably true of other parts of Canada. The late Henry Bull, Q.C., then the senior Crown attorney in the Province of Ontario, constantly asserted the quasi-judicial character of the office of Crown attorney, especially the element of independence from interference by the Attorney General or his senior advisers in making prosecutorial decisions. Historically, I have always been convinced that Mr. Bull's position was flawed when we examine the origins and development of the office of Crown prosecutor and its precursor the County attorney. This official has, from the earliest history of Upper Canada and Lower Canada, been the Attorney General's agent who is directly responsible to the senior Law Officer of the Crown and subject to his directions and control. The extent to which the Attorney General of the day involved himself in particular cases would vary from incumbent to incumbent. And it would be reasonable to assume that the more experienced Crown attorneys would be left very much on their own.

Interestingly, I came across the same experience in the United States when I visited the Department of Justice in Washington a few years ago. The United States Attorney's office in the Southern District of New York, the largest in the federal system, has always regarded itself as immune from direction by the Attorney General. Securing its adherence to the Attorney General's guidelines regarding prosecutions was, I was told, a painful but necessary exercise. Such *de facto* independence may have fostered the idea in Canada also that the Crown attorney was legally an independent officer, a quasi-judicial functionary, but this fallacy has already been exposed (see especially Stenning, "Appearing for the Crown", Chap. 7) and I shall refrain from pursuing its historical justification further in this opinion.

The creation within the hierarchy of the Department of Attorney General of a public service office designated as the "Director of Public Prosecutions" or "Director of Crown Attorneys" in no way alters the relationship that I have described in the preceding paragraphs. This kind of Director is a public servant whose status in the organization of government is dependent on his rank within the Department. Invariably, he will be subordinate to the Deputy

Attorney General (though this is not necessarily so) and thereby subject to receiving instructions from either the Deputy Minister or the Minister himself, in his capacity as the Attorney General. The critical factor is the absence of any statutorily defined powers that are conferred upon the Director in his capacity as Director of Public Prosecutions. In the absence of any such express statutory authority the Director derives all his inherent authority from the office of the Attorney General, and therefore is directly accountable to the Attorney General.

(iii): *Where there is a statutory office of Director of Public Prosecutions with express powers and functions.*

Obviously, where a statutory office of Director of Public Prosecutions has been created the relationship of the holder to the Attorney General is entirely distinguishable from that which obtains where the Director is part of the normal bureaucracy in the Department of Attorney General. There is no need to revert to this debate here; the pros and cons have been covered at length in my previous submissions to the Commission. What concerns us now is the impact which the establishment of the statutory D.P.P.'s office will have with respect to the limits of discretionary power exercisable by each of the province's Crown prosecutors. If it is decided to accord the Director of Public Prosecutions a substantial measure of independence vis-à-vis the Attorney General, it might seem incongruous, to say the least, if the same principle of theoretical independence were to be extended to all of the Crown prosecutors in discharging their prosecutorial duties. For in so doing the authority of the D.P.P., for all practical purposes, would be nullified and the objective that supports the appointment of a statutory "independent" D.P.P. would be effectively neutralized.

Let me remind you of the three models that have addressed this subject and which have also been studied in some detail in my previous opinions.

The English Model

Under the provisions of the British *Prosecution of Offences Act, 1985*, s. 1(6):

"every Crown prosecutor shall have all the powers of the Director [of Public Prosecutions] as to the institution and conduct of proceedings but shall exercise those powers under the direction of the Director."

How this categorical confirmation of the D.P.P.'s right to the final word, in the event of a dispute between the Director and a Crown prosecutor or Chief Crown Prosecutor, is handled in actual practice cannot be exhaustively analyzed in this memorandum. In a very short space of time after its creation in 1985 the new Crown Prosecution Service saw a new Department of the Director of Public Prosecutions emerge from the amalgamation of the old D.P.P.'s office, the local authority Prosecuting Solicitors' Departments outside London and parts of the Metropolitan Police Solicitor's Department. The first annual report issued in 1987 by the first Director of the new Service, Sir Thomas Hetherington, describes the 31 field areas into which England and Wales has been divided. Each prosecution area is headed by a Chief Crown Prosecutor to whom delegated responsibilities of a major character for decision-making have been assigned. The Headquarters of the Service, it is now claimed (see Annual Report 1986-87, p. 22), has fewer cases referred to it for decision than was formerly the case under the pre-1985 Department of Public Prosecutions.

The same annual report explains that:

"The overwhelming majority of cases (including, for example, offences of homicide, attempted murder, rape and perjury) are now referred to Headquarters only if the C.C.P. [Chief Crown Prosecutor] in the Area concerned considers this to be necessary in particular circumstances. He may regard the case as one of particular difficulty or exceptional public concern, or he may feel that there are factors (such as the involvement of a local councillor or official) which render it necessary to avoid suggestions of improper local influence. Only a handful of offences must always be referred to Headquarters: for example, treason, all prosecutions requiring the consent of a Law Officer and incitement to commit such offences, certain prosecutions requiring D.P.P. consent, abortion, large scale drug and immigration conspiracies, criminal libel, election petitions and criminal bankruptcies...

As well as cases of exceptional public concern or exceptional difficulty referred to headquarters by CCPs, a number of categories of offence are normally prosecuted from headquarters. These include cases under the Official Secrets Act, *terrorist and "supergrass" cases, incitement to racial hatred, extradition cases, major commercial fraud in the Metropolitan Police district and cases of particularly large and complex fraud."* (*op. cit.*, pp. 22-23)

The picture that emerges from the Service's first annual accounting to Parliament of its mandate is that of a largely decentralized organization in which the vast majority of prosecutorial decisions are made by the Crown Prosecutor in the local area. He has ready access to the Chief Crown Prosecutor in charge of his particular region and presumably the latter can override his subordinate's decision. In the same way, the Director of Public Prosecutions retains the final decision-making power in the event that he is called upon to adjudicate between the conflicting recommendations of the Crown Prosecutor in charge of the particular case and the supervising Chief Crown Prosecutor. Such instances, we may conjecture, will decline as the new Service matures and confidence grows in the judgmental authority of the senior members of the Service. What, however, is very clear from the 1985 statute is the location of ultimate authority and the right of the D.P.P. to delegate that same authority in accordance with clearly defined procedures.

The Victoria, Queensland and New South Wales Models

Taking the Victoria enactment as the embodiment of a policy that has found favour in the sister states of Queensland and New South Wales, Section 10(1) of the *Director of Public Prosecutions Act, (Victoria)* (No. 9848 of 1982) authorizes the Director to furnish guidelines (better described perhaps as directives) to:

"(a) prosecutors for the Queen and other persons acting as prosecutors for the Crown;
(b) members of the police force; and
(c) any other person or persons; with respect to the prosecution of offences but the Director is not entitled to furnish guidelines in relation to a particular case."

The *Director of Public Prosecutions Act (Queensland)* (No. 95 of 1984), s. 11(1) is to the same effect.

The most recent legislation in Australia on the subject, the *Director of Public Prosecutions Act (New South Wales)* (No. 207 of 1986) makes separate provision for the furnishing of guidelines to Crown Prosecutors and to the police. The relevant sections read as follows:

s.13 "Guidelines to Crown Prosecutors etc. by Director
(1) The Director may, by order in writing, furnish guidelines to the Deputy Directors, the Solicitor and the Crown Prosecutors with respect to the prosecution of offences, including guidelines as to the

exercise of specified functions (whether statutory or not).
(2) Guidelines may not be furnished in relation to particular cases.

s.14 Recommendations and guidelines to police etc. by Director
(1) The Director may recommend to
(a) the Commissioner of Police; or
(b) any other person who
(i) conducts investigations in relation to offences; or
(ii) institutes or conducts prosecutions for offences, that proceedings be instituted in respect of any offence.
(2) The Director may, by order in writing, and after consultation with the Attorney General, furnish guidelines to the Commissioner of Police or any such person with respect to the prosecution of indictable offences or prescribed summary offences.
(3) Guidelines may not be furnished in relation to particular cases."

The pattern of unanimity on the part of these principal States is particularly noteworthy insomuch as all three jurisdictions agree that there should be an express prohibition against the D.P.P.'s interference in the disposition of an individual case. It should also be noted that the prohibition against issuing guidelines in relation to particular cases extends beyond the Crown Prosecutors and includes the police as potential targets of such direction by the State's Director of Public Prosecutions. I find the New South Wales legislation unclear on this matter, the unqualified interdiction in s. 14(3) standing alongside a prior Subsection 14(1) which permits the Director to recommend to the police that proceedings be instituted in respect of any offence. If the New South Wales enactment is given the "plain sense" interpretation, the operative distinction is that between the right of the D.P.P. "to recommend that proceedings be instituted in respect to any offence" but not to "furnish guidelines in relation to particular cases". Should the principle exemplified originally in the Victoria statute (s.10(1)) receive the support of the Commissioners it would clarify matters if the language of that enactment be chosen in preference to the ambiguities embedded in the New South Wales provisions.

The Commonwealth of Australia Model

In marked contrast to the position taken by those States in Australia which have taken the initiative of creating "independent" offices of Director of Public Prosecutions, the federal legislation places no barrier in the way of its D.P.P. assuming the direction of a particular case. According to s. 11(1) and (2) of the Commonwealth of Australia's *Director of Public Prosecutions Act (*No. 113 of 1983):

s.11. "Directions and guidelines by Director

(1) The Director may, by instrument in writing, give directions, or furnish guidelines, to

(a) the Commissioner of Police of the Australian Federal Police;

(b) the Crown Solicitor or a Deputy Crown Solicitor; or

(c) any other person who

(i) conducts investigations in relation to offences against the laws of the Commonwealth; or

(ii) institutes or carries on prosecutions for offences against the laws of the Commonwealth, with respect to the prosecution of offences against the laws of the Commonwealth.

(2) Without limiting the generality of Subsection (1), directions or guidelines under that Subsection may be given or furnished in relation to particular cases and may specify

(a) an offence against a law of the Commonwealth, being an offence a matter relating to which is to be referred to the Director for the institution or carrying on of a prosecution for that offence; or

(b) a class of offences against the laws of the Commonwealth, being offences matters relating to which are to be referred to the Director for the institution or carrying on of prosecutions for those offences.

(3) The Director shall

(a) give to the Attorney General a copy of each direction given or guideline furnished under Subsection (1); and

(b) include in a report under Subsection 33 (1):

(i) a copy of each direction given or guideline furnished under Subsection (1) of this section during the period to which the report relates; and

(ii) a copy of each direction given or guideline furnished under Subsection (1) of this section as in force at the end of that period."

The language resorted to in the above Commonwealth of Australia statute is explicit enough to reject any suggestion that its Director of Public Prosecutions cannot intervene to direct how a particular case should be dealt with (a) by the police who are in charge of the investigation or (b) by the Crown Solicitor who is in charge of the institution and conduct of the prosecution.

7.7
An evaluation of the respective approaches from the dual perspectives of enhancing the degree of independence in decision-making and ensuring the maximum adherence to the principles of accountability

In deciding which of these three procedural models is constitutionally preferable and, accordingly, should be considered for implementation as part of any prosecutorial reforms in Nova Scotia, I begin with the principle that if the Director of Public Prosecutions is to be held accountable to the Attorney General for the proper performance of his statutory responsibilities the Director must have the commensurate discretion to decide whether the case is to proceed, for what offence(s) and by which procedure, or, if the circumstances warrant the exercise of the extraordinary power, to order that the prosecution be stayed. My expectation is that the Director should not expect to wield this general power on a regular or frequent basis. If the right policy guidelines are prepared and accepted by the Crown prosecutors it should be truly exceptional to find the D.P.P. (or the Attorney General) becoming personally involved in handling the course of particular criminal proceedings. That remote eventuality, however, must be safeguarded if the Attorney General's own position is not to become an empty constitutional shell.

To the maximum extent possible the Director of Public Prosecutions must be allowed to provide guidance, support and direction without reference to the Attorney General. Policy statements in the form of guidelines or directives should receive the imprimatur of the Attorney General before they are distributed to the Crown prosecutors. The contents of such guidelines will be of great importance and the Attorney General must devote serious attention to the principles that are enunciated under his authority. I shall have more to say shortly on the importance that I attach to the preparation and public promulgation of prosecutorial guidelines. For the moment I am disposed optimistically to assume that they will assuredly come into existence in time. If, at any time, any of the guidelines are seen to be deficient or to be creating problems of a general nature, the Attorney General must act decisively to ensure that remedial action is taken by the Director of Public Prosecutions. And it can be anticipated that new problems and new situations will generate the necessity for continuous review of the contents of these policy positions. To anticipate in advance how these kinds of problems should be handled will assist in reducing the necessity for the Attorney General to invoke his ultimate authority by way of issuing directions to the Director as to the disposition of an individual case.

And the same proposition must govern the Director's decision whether or not to intervene in the handling, at any or every stage, of a particular case. Only in the most exceptional situations should the Director seriously contemplate becoming actively involved. This may occur as a result of his advice being sought by the Crown prosecutor in charge of the case, or the Director's own determination

that his intervention can be justified in retrospect when all the surrounding circumstances are revealed. Invoking his superior authority, in itself, should never be regarded as sufficient justification for such intervention.

Judging the respective enactments by reference to these underlying principles, the British provision on its face imposes no restrictions on the D.P.P.'s authority to issue directions to a Chief Crown Prosecutor, Crown Prosecutor, or to the entire body of prosecutors. These directions may be general or specific in character, and they may deal with a class of offence or with the precise circumstances of a particular case. In short, the British legislation confers unconditional power of theoretical direction upon its D.P.P., the only constraint being that the D.P.P. must always remember that he is accountable to the Attorney General for the performance of his duties and that, in a special case, he (the D.P.P.) may be subject to the directions of the Attorney General. If there is general satisfaction in England and Wales with this scheme of things, much credit must be accorded to the years of experience and understanding of how the former Department of Public Prosecutions functioned before the new legislation of 1985.

A non-interventionist philosophy has long dominated the English D.P.P.'s interpretation of his functions. The new statutory scheme has certainly changed some of the fundamental aspects of the "old" order but I do not perceive a readiness to radically transform the D.P.P.'s organization into an interventionist definition of the Director's role. Nevertheless, for the Government of Nova Scotia to incorporate into any new legislation a provision similar to that contained in the British *Prosecution of Offences Act 1985*, s. 1(6), would effectively destroy any hopes of attaining a substantial degree of independence on the part of the front line prosecutors or in imbuing the Director of Public Prosecutions with the right philosophy in his approach to his statutory duties. I would not support the British legislation for these reasons.

At the very opposite of the English approach we find the D.P.P. statutes in Victoria, Queensland and New South Wales completely insulating their respective Directors from any form of participation in the disposition of particular cases. Words such as "directives" appear alongside "guidelines" as equally unacceptable, so that it may be impossible to visualize even the most informal sort of advice being tendered by the Director of Public Prosecutions without being in breach of the statutory prohibition. Does advice that is forthcoming in response to a request for assistance by the local prosecutor equally fall within the statutory ban?

My opposition to the extreme position adopted by the Australian States is not governed by any desire to see a Nova Scotia Director of

Public Prosecutions become a regular and active participant in the decision-making process at the ground level of criminal prosecutions. That would run counter to my notions of what supreme authority connotes. It does not involve the constant invoking and exercising of such authority in order to demonstrate that it exists. Rather it should be held very much in reserve and only be brought into play if all the surrounding circumstances cry out for activating the residual power and thereby are able to demonstrate publicly why this course of action was justified. The judgment of the Director may be questioned but a reference to the bar of public opinion is the inevitable price that has to be paid for wielding this exceptional power.

In my judgment, the provisions contained in the Commonwealth of Australia statute come closest to incorporating the principles that should be at the foundation of exercising prosecutorial authority, whether this authority is seen to be discharged by the local Crown prosecutor in immediate charge of the case, by the Director of Public Prosecutions or by the Attorney General. In conferring the largest measure of independence upon each of the subordinate officials the Commonwealth statute - except in one important instance - ensures that the high price demanded by the doctrine of answerability is amply safeguarded. It does so by requiring that not only should any directions or guidelines that emanate from the desk of the Attorney General be reduced to writing and bear the Attorney's signature but also by insisting that the contents of any such directives be made publicly known.

Two processes are mandated for guaranteeing this kind of public access to the contents of every written directive issued by the Attorney General. The first of these requires that a copy of the instrument be published in the official *Gazette*, a publication that is readily available in any governmental book shop or public library. The second obligation is that a copy of the instrument that contains the Attorney General's directive (or guideline) be laid before each House of Parliament within a set period of time. What is vitally important to remember, in the Commissioners' discussions on this subject, is that *both* the Attorney General's *general guidelines* and any *specific directive* relating to a particular case, issued to the D.P.P. for implementation, have to be made public under the terms of the Commonwealth statute. The deterrent that these provisions must exert on an Attorney General who might be inclined to become meddlesome is very apparent. On the other hand, if the Attorney General deems it to be his public duty to take charge of a particular case and to publicly justify his actions, the procedure for so doing is in place and with the necessary effective safeguards.

For some undisclosed reasons, the principles just enunciated as they relate to the Attorney General are substantially weakened when it is the Director of Public Prosecutions who decides to intervene in the disposition of a particular prosecution. The Commonwealth D.P.P.'s authority to do so is contained in Section 11(2) of the parent statute. There is, however, no reference to the necessity of promptly tabling before Parliament the D.P.P.'s written guidelines or directions nor of having them published speedily in the *Gazette*. The same omission is noteworthy as it relates to any specific directive issued by the Commonwealth D.P.P. with reference to a specific case. All that is required of the Director (see ss. 11(3) and 33), is (a) that he provide the Commonwealth Attorney General with a copy of every general or specific directive which he has issued to the prosecutors or the police, and (b) that he include in his annual report to the Attorney General a copy of every such directive that was delivered during the period to which the report relates, identifying which guidelines or directives are still in force at the time of submitting the report.

The D.P.P.'s annual report must be tabled in each House of Parliament within seven days of its receipt by the Attorney General. Consequently, room is provided for a belated notification to the legislature of all interventions by the Director of Public Prosecutions. I have reflected for some time on this differentiation in the mode of accountability and I continue to experience problems in providing an adequate explanation for the divergent stance adopted by the Australian Parliament on this vital question. To ensure that the Commissioners have a complete comprehension of the pertinent parts of the Australian *Director of Public Prosecutions Act*, I shall quote them verbatim below:

s.8. "Directions and guidelines by Attorney General:
(1) In the performance of the Director's functions and in the exercise of the Director's powers, the Director is subject to such directions or guidelines as the Attorney General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.
(2) Without limiting the generality of Subsection (1), directions or guidelines under that Subsection may:
(a) relate to the circumstances in which the Director should institute or carry on prosecutions for offences;
(b) relate to the circumstances in which undertakings should be given under Subsection 9 (6); and
c) be given or furnished in relation to particular cases.
(3) Where the Attorney General gives a direction or furnishes a guideline under Subsection (1), he shall:
(a) as soon as practicable after the time that is the relevant time in

relation to the instrument containing the direction or guideline, cause a copy of the instrument to be published in the Gazette; *and*
(b) cause a copy of that instrument to be laid before each House of the Parliament within 15 sitting days of that House after that time.
(4) Subject to Subsection (5), the relevant time for the purposes of Subsection (3), in relation to an instrument under Subsection (1), is the time when the instrument is made.
(5) Where:
(a) an instrument under Subsection (1) relates to a matter in relation to which proceedings may be instituted or are being carried on; and
(b) the Attorney General is satisfied that the interests of justice require that the contents of the instrument not be disclosed;
the relevant time for the purposes of Subsection (3) in relation to the instrument is whichever is the earlier of the following times:
(c) the time when the Attorney General ceases to be satisfied as to the matter mentioned in paragraph (b); or
(d) the time when:
(i) it is decided that no proceedings will be instituted in relation to the matter; or
(ii) all proceedings in relation to the matter (including proceedings by way of appeal from, or otherwise arising out of, proceedings in relation to the matter) are determined or discontinued, as the case may be.

s.11. Directions and Guidelines by Director:
(1) The Director may, by instrument in writing, give directions, or furnish guidelines, to:
(a) The Commissioner of Police of the Australian Federal Police;
(b) The Crown Solicitor or a Deputy Crown Solicitor; or
(c) any other person who:
(i) conducts investigations in relation to offences against the laws of the Commonwealth; or
(ii) institutes or carries on prosecutions for offences against the laws of the Commonwealth, with respect to the prosecution of offences against the laws of the Commonwealth.
(2) Without limiting the generality of Subsection (1), directions or guidelines under that subsection may be given or furnished in relation to particular cases and may specify:
(a) an offence against a law of the Commonwealth, being an offence a matter relating to which is to be referred to the Director for the institution or carrying on of a prosecution for that offence; or
(b) a class of offences against the laws of the Commonwealth, being offences matters relating to which are to be referred to the Director for the institution or carrying on of prosecutions for those offences.

(3) The Director shall:
(a) give to the Attorney General a copy of each direction given or guideline furnished under Subsection (1); and
(b) include in a report under Subsection 33 (1):
(i) a copy of each direction given or guideline furnished under sub-section (1) of this section during the period to which the report relates; and
(ii) a copy of each direction given or guideline furnished under Subsection (1) of this section as in force at the end of that period."

Questions as to the justification, in the Commonwealth of Australia legislation, for treating directives by the Attorney General differently from directives issued by the Director are accentuated when we recall the policy incorporated into the Victoria statute. As we have previously seen, s.10 of the *Director of Public Prosecutions Act* (Victoria), (No. 9848 of 1982) enables the Director to furnish guidelines, from time to time, to the prosecutors and to the police but never in relation to a particular case. The same provision, however, imposes a duty upon the D.P.P. of Victoria to ensure that a copy of any guidelines, issued under his name, is published in the state *Gazette*. A close examination of the subsequent legislation enacted by the State of Queensland (No. 95 of 1984) and the State of New South Wales (No. 207 of 1986) reveal that, while ostensibly emulating the lead taken by the State of Victoria in creating an independent Director of Public Prosecutions, both Queensland and New South Wales retreat from the principles of accountability reflected in the Victoria enactment's insistence on securing immediate public disclosure of all the directives issued in writing by its D.P.P. All that is required of the holder of the same office in New South Wales is that he provide the Minister (the Attorney General) with a copy of each guideline issued to the police or the State prosecutors (see the New South Wales statute, ss.14-15). Queensland has adopted the federal government's policy, being content to see its D.P.P.'s directives brought to the attention of the State's legislature by means of the Director's annual report (see Queensland statute, ss. 11(2) and 16). The N.S.W. statute, on the other hand, is silent as to the required contents of the D.P.P.'s annual report, merely stating that it should report on "the work and activities of the Director" for the preceding year.

Before bringing this comparative analysis of the various Australian statutes to a close, mention should be made of the N.S.W.'s devotion to the same kind of double standard that we have seen reflected in the Commonwealth's governing legislation on public prosecutions. Thus, while precluding the issuance of any

directive with respect to a particular case by either the D.P.P. or the Attorney General, all other directives or guidelines transmitted by the N.S.W. Attorney General to the Director for implementation must be published in the official *Gazette* "as soon as practicable" and placed before Parliament within 14 days of publication. Provided that the Attorney General is given a copy of every directive issued by the D.P.P. and that these are included in the N.S.W. Director's annual report, nothing further is expected of that official in terms of accountability.

Yet another instance of "double standards", or inconsistent provisions within the same enactment if that comment is preferable, is contained in Section 27 of the New South Wales *Director of Public Prosecutions Act* (No. 207 of 1986). It states:

"s.27

(1) The Attorney General shall notify the Director whenever the Attorney General exercises any of the following functions:
(a) finding a bill of indictment, or determining that no bill of indictment be found, in respect of an indictable offence, in circumstances where the person concerned has been committed for trial;
(b) directing that no further proceedings be taken against a person who has been committed for trial or sentence;
(c) finding a bill of indictment in respect of an indictable offence, in circumstances where the person concerned has not been committed for trial;
(d) appealing under Section 5D of the Criminal Appeal Act 1912 *to the Court of Criminal Appeal against a sentence.*
(2) The Director shall include in a report under Section 34 information as to the notifications received by the Director from the Attorney General under this section during the period to which the report relates."

Earlier, in Section 26 of the same statute there appear the following provisions:

"s.26

(1) In the exercise of the Director's functions, the Director is subject to such guidelines as the Attorney General, after consultation with the Director, furnishes to the Director by order in writing.
(2) Without limiting the generality of Subsection (1) guidelines may relate to the circumstances in which the Director should institute or carry on prosecutions for offences.
(3) A guideline may not be furnished in relation to a particular case."

As I read these respective sections I find it somewhat difficult to reconcile the principle embodied in s. 26(3), prohibiting interference with respect to a particular case, and that reflected in s. 27 which speaks of the Attorney General "exercising any of the following functions", which are clearly instances where the Attorney General may choose to become actively involved in the outcome of a particular case and in the most direct fashion. What, for example, could illustrate more personal involvement than the Attorney General "directing that no further proceedings be taken against a person who has been committed for trial or sentence" (*op. cit.*, s.27(c))? Disclosure of the Attorney General's active participation in an individual case, by way of any of the powers listed in s. 27, will not become public knowledge until the D.P.P.'s annual report is tabled in Parliament by the Attorney General (s. 34). This may be many months after the event in question. The Director's annual report, it is true, must contain a record of every "notification" received from the Attorney General as to his "interventions" under s. 27 of the same legislation. Nevertheless, it would have been illuminating to learn of the discussions in each of the Australian governments concerned that preceded their selection of the timing provisions chosen to discharge the principle of accountability. Since that kind of penetration behind the curtain of drafting instructions is out of the question, I must substitute my own assessment of the Australian solutions.

7.8

My recommendations based on the preceding evaluation of the Australian legislation, together with a postscript on the necessity for making publicly known, in every Canadian jurisdiction, the pertinent directions and guidelines that explain how prosecutorial discretion should be exercised

As I judge the various alternative solutions resorted to in the Australian statutes, what I find lacking, especially in those instances where the annual report to the legislature is designated as the time and place in which to disclose the issuance of particular directives, is that special effectiveness associated with the contemporaneous public disclosure of what is going on in the offices of the Attorney General and of the Director of Public Prosecutions. The passage of time somehow diminishes the bite that can be exhibited when the conduct of a Minister or public official is examined close to the time of its occurrence. It is for this reason that I strongly support imposing a statutory duty upon both the Attorney General and the Director of Public Prosecutions to make publicly known the reasons for their intervention into the ordinary processes of prosecutorial decision-making. The paramount circumstances for imposing this statutory obligation arise where the handling of a particular case is at stake. Equally important, if not so pressing in the immediacy of its consequences, is the public disclosure of all prosecutorial guidelines and directives that spring from the offices which wield the greatest authority throughout the entire machinery of criminal prosecutions.

It goes without saying that all such directives by the Attorney General or the D.P.P. should be given in writing and bear the personal signature of the official concerned. And the most effective platforms for ensuring the widest disclosure of the contents of all such guidelines or directives are those (however inconsistently) chosen by the Australian jurisdictions, *viz.*, publication in the *Gazette* and the simultaneous tabling of the same written instruments before Parliament or the legislature. Special consideration must be given to the arguments in favour of delaying publication where unwarranted prejudice may be caused to innocent parties. A reference back to ss. 8(4) and (5) of the Commonwealth of Australia legislation illustrates how that problem might be overcome.

So as to avoid any possible misunderstanding, I might elaborate a little more on the precise limits that I have in mind in advocating public disclosure of the Attorney General's and the D.P.P.'s instructions in matters involving the exercise of prosecutorial discretion. None of the Australian enactments includes an interpretation of the terms "guidelines" or "directives". And it will have been noted that I use these words interchangeably. Another word that perhaps better conveys a key element in requiring public disclosure is "instructions" by either of the most senior officials. Take, first, the preparation of general provisions describing the relevant factors that should properly be taken into account as well as those considerations that should never become part of the decision-making process. I would describe these kinds of statements as "guidelines" insomuch as they envisage a considerable amount of discretion on the part of the actual decision-maker. "Directives" or "instructions", on the other hand, are terms that better reflect the mandatory execution by a subordinate of the orders issued by that person's superior. In other words, the element of discretion on the part of the subordinate is practically eliminated, depending on the precision with which the "directive" or "instruction" is formulated.

This attempt at defining the meaning to be accorded to these potentially vital terms is designed to emphasize that there is no intention to limit the process of advice and consultation which ought to be an integral part, at every level and between levels of authority, of the prosecution system. I am not advocating that the contents of such advice be always reduced to writing and made the subject of public disclosure. This is especially so where the determination of what is to be done in a particular case is at stake. Once the general guidelines are in place, and the delegation of authority has been defined, any intervention from above by way of seeking to *dictate* how the discretionary power is to be exercised falls squarely within the ambit of a "directive" or "instruction" that must be publicly disclosed. Having offered this analysis of the principles to be

applied, let me acknowledge the difficulties facing a legislative draftsman in converting my explanations into interpretation clauses that will appear in statutory form.

Nothing that I have said above should preclude the Attorney General or the Director of Public Prosecutions, personally or through counsel, making a public statement in court by way of explanation as to the decision that has been taken. The same observation applies to the situation where the Attorney General is of a mind to make a formal statement on the floor of the legislature. Examples of both of these kinds of initiative have been given in earlier opinions. I see no conflict of principle between the discretionary initiative that has always been at the disposal of the Attorney General "to go public" and the mandatory obligation that, in my opinion, should be imposed by statute to ensure that the written record of the Attorney's or the Director's directives are made available for public scrutiny.

Another major concern upon which I have endeavoured to make my views known is the necessity for making publicly accessible the relevant considerations that enter into prosecutorial decision-making. With the advent of the Charter of Rights and the recognition of reviewability by the courts of the Attorney General's prerogative powers it becomes more imperative than ever that this kind of initiative be accelerated. Outside of Canada, we find the Attorneys General of the United States, of England and Wales, and of Australia in the vanguard of a movement that is developing its own impetus (see Edwards, "The Attorney General", chap. 13). I do not propose in this opinion to delve into the specifics of the published guidelines that are now readily available in each of the above countries. This exercise, worthy of the Commissioners' attention, may have to be undertaken at a later stage.

For the present, I shall content myself with recapitulating the views that I expressed in my 1986 lecture on "The Attorney General and the Charter of Rights" (see R.J. Sharpe (ed.) "Charter Litigation" pp. 66-68) where I stated:

"Total objectivity in assessing the broad range of discretionary factors that relate to prosecutorial decisions is an unattainable goal. Nevertheless, there may well be inherent advantages, for example, in incorporating into a publicly accessible document those matters that should not be allowed to influence the decision to initiate, to continue or to stay criminal proceedings. Among these I would expect to find considerations based on the prospective accused's race, religion, sex, national origin, political beliefs or political association. And I regard it as clearly wrong for the Attorney General, in exercising his discretionary authority, to discriminate in favour of his political colleagues or supporters or against his

political opponents, simply because they are his supporters or opponents. In the same vein I would expect the guidelines to reject as unacceptable considerations the prosecutor's personal feelings towards the defendant or the victim and also the possible effect of the Crown Attorney's decision on his professional standing within the government legal service.

At present, to the best of my knowledge, there does not exist anywhere in Canada a "prosecutor's manual" that enjoys the description of a public document. Some of the provincial Attorneys General have seen fit to disclose publicly the occasional directives that they issue, and in other provinces a consolidated set of policies exists for the private and professional use of prosecutors. In my view, the time has come when serious attention must be given by every Attorney General in this country to issuing for public information a formal document bearing the signature of the Attorney General and which sets forth the general principles and relevant considerations that must govern the handling of individual prosecutions by the official directly in charge of each case. As stated earlier, there is no want of comparative models by which to judge both the substantive content of such compilations and the quality of their adherence to the principles of openness and accountability.

I do not underestimate the arguments that will be advanced in opposition to relinquishing the traditional cloak of secrecy that has surrounded the decision-making activities of those who prosecute in the name of the Crown. I would remind those inclined to oppose the adoption of a more open approach to disclosure of the straws that are blowing in the wind in the wake of the expansive interpretation accorded by the Supreme Court of Canada to Section 7 of the Charter. Failure to take the initiatives suggested in this paper may well result in a successful challenge to a particular prosecution on the ground that the accused's right not to be deprived of his liberty is infringed by the failure to adhere to the principles of fundamental justice that require prior disclosure to the public at large of the general considerations to which the Crown's decisions must be shown to conform.

The release for public examination of prosecutorial guidelines, along the lines suggested in this paper, might well herald a greater inclination on the part of aggrieved citizens to apply for judicial review of prosecutors' decisions. In addition, we have to recognize that the advent of Section 32 of the Charter of Rights into Canadian law gives prospective litigants an enormous advantage, insomuch as the issue of justiciability of such claims will primarily rest on the

petitioner's ability to demonstrate that one of the enumerated rights or freedoms has been infringed by the action of the Attorney General or his representative. Still, major obstacles face the prospective litigant who seeks the intervention of the court to subject the prosecutor's actions to a substantive or procedural reassessment. To overcome these obstacles the plaintiff will have to adduce evidence establishing bad faith, personal bias or other grounds of abuse of the discretionary power. Alternatively, the evidence must point to the particular decision having been dictated by extraneous or improper considerations to such an extent that the basic principles of fairness have been violated.

These are formidable burdens to discharge, given the innate reluctance of the Attorney General and his agents to disclose to the court the relative weight attached to the range of diverse considerations in individual cases. The abuse of process doctrine, pulled hither and thither since it was first introduced into Canadian law in R. *v.* Osborn *(1969), has now been finally sanctioned by the Supreme Court in* R. *v.* Jewitt *(1985), thus pointing again to a more receptive attitude towards the judicial examination of questionable instances of the Attorney General's discretion. And although the Court of Appeal in* Nelles *v.* R. in Right of Ontario *(1985), declined to tamper with the absolute immunity of Crown prosecutors from malicious prosecution suits, an immunity that was said to derive from the common law, the day may not be too far distant when this unqualified immunity may be curtailed in circumstances where clear evidence of "malice" is forthcoming and where the foundations of the common law doctrine may be shown to be less substantial than has been generally accepted. Furthermore, I believe that all the Charter arguments reviewed in this paper will apply with equal force to malicious prosecution suits, a possibility that was rightly acknowledged by Thorson J.A., delivering the judgment of the Court of Appeal in the* Nelles *case.*

None of these arguments, it must be emphasized again, is directed towards asking the court to substitute its judgment for that of the prosecutor. If reviewability is to be entertained the focus of attention must be on the process of exercising the discretionary authority. Permitting this extremely limited access to the courts for judicial review should not be seen as an erosion of the Attorney General's traditional position in relation to the bench. On the contrary, it should be viewed as a legitimate avenue for the citizen to pursue and one that is entirely consonant with the accountability of the Attorney General to the legislative body for a full explanation and defence of his immense constitutional powers." [23]

23. These views were reiterated in the course of my 1987 Viscount Bennett Lecture at the University of New Brunswick (see 36 U.N.B.L.J., 41 at pp. 54-56).

So far as I am presently aware, New Brunswick is the first province to have prepared, for every member of the public who wishes to become familiar with the basics of prosecutorial discretion, a publication entitled "The Prosecutions Policy Manual". Its release, in both official languages, on May 1, 1987 represents a veritable milestone in the history of Canada's justice systems though we may wonder why this country has lagged behind the pioneering efforts of so many other countries. Other provinces, I am also aware, are in various stages of converting their ad hoc policy statements into a more consolidated and integrated mold. I understand that Alberta and British Columbia, possibly others, have followed the New Brunswick lead in this matter. Not having had an opportunity to study these documents I cannot express any opinion on their respective merits.

Obvious though it may seem, what needs to be stressed is the importance of involving the rank and file prosecutors in the preparation of such policy guidelines. Perspectives often diverge according to the role which the various participants are expected to play in the administration of justice. And with personnel who are professionally trained, often with years of experience in the handling of prosecutions in both the trial courts and at the appellate level, it should not be necessary to urge every Attorney General to involve these independently minded prosecutors at every stage of the drafting exercise. This Commission has seen what happens when the heavy hand of prosecutorial bureaucracy is blind, or at least insensitive, to the views held by the prosecutors in charge of a particular case. There is nothing inconsistent in denying complete independence of discretionary authority to the ordinary Crown prosecutor while, at the same time, making sure that the maximum opportunity is created for the same line staff to share in developing the guidelines within which each level of responsibility will be expected to function in future.

7.9 Conclusions

(i) In my previous memoranda to the Commission I have examined the diversity of formulae used in other jurisdictions to define the status and discretionary powers of its Director of Public Prosecutions (or equivalent title), and those of the Crown prosecutors and Special Prosecutors. At the centre of all these statutory formulations is the redefinition of the authority of the Attorney General. In this opinion, I review the respective legislative definitions of these central relationships and offer my own judgment as to which option should be recommended for adoption by the Nova Scotia legislature.

(ii) Central to my recommendations in this regard is the need to ensure that in conferring upon any office holder the maximum degree of independence when making prosecutorial decisions there is a

parallel regard for sustaining the principle of ministerial accountability.

(iii) Fundamental changes are called for in Nova Scotia and these cannot begin to be realized if the Attorney General, and the Department for which he is responsible, are permitted to resume functioning in the same old ways that contributed to the errors and faults documented before this Commission. Hence my emphatic rejection of the principle which, if incorporated into statutory form, would provide that every Crown prosecutor, including a statutory or non-statutory D.P.P., is to exercise his functions subject to the unqualified direction and control of the Attorney General.

(iv) Incongruous as it may seem, despite my rejection of the first option, I am disposed to see the appointment of Attorney General remain as a political office with the holder as a member of the Government and Cabinet. To choose a different course, in which the Attorney General became a non-political, public service appointment would necessitate the creation of a Minister of the Crown with responsibility for overseeing all aspects of the administration of justice, other than those recently assigned to the new Ministry of the Solicitor General. The appearances of fundamental reform that might be thought to be associated with depoliticizing the office of Attorney General must be viewed against the abandonment of the doctrine of ministerial accountability. This is not a price that I would urge upon the Commission as the best solution to all the problems associated with the machinery of justice in Nova Scotia.

(v) Furthermore, there does not exist in Canada the constitutional understandings that enable the English Attorney General and the English D.P.P. to function smoothly and cooperatively under the "superintendence" formula. In judging how far the English legislation provides the key to demonstrating the qualities of independence deemed to be necessary in a new statutory office of D.P.P. in Nova Scotia, I have concluded that this is not the course to follow.

(vi) Turning next to consider the various options presented by the Australian initiatives in creating an office of Director of Public Prosecutions, it is important to judge the level of independence attached to that particular office not so much by the claims made by the initial occupants as by the statutory language used to describe the level of accountability to the legislature.

(vii) Another context in which to make this kind of assessment is that provided by the precedents relied upon by the Stormont and Westminster Parliaments when describing the relationship between the Director of Public Prosecutions in Northern Ireland and the Attorney General of England and Wales. In doing so, great care must be taken to distinguish between the *de jure* power of direction exercisable by the Attorney General and the delegation of the maximum amount of *de facto* independence to the D.P.P.

(viii) As attractive as the conferring of total independence upon the office of D.P.P. may be in theory, the question must be asked, what is to be done if the "independent" D.P.P. makes decisions that forfeit public confidence? The opportunity is taken in this opinion to evaluate the concerns expressed by Geoffrey Marshall (in his monograph "Constitutional Conventions - The Rules and Forms of Political Accountability", 1984) about the notion of an "independent" Director of Public Prosecutions within the context of the English parliamentary system. The issues that he raises are very germane to the position in Nova Scotia at the present time.

(ix) Appropriately, Marshall approaches the question of independence by way of the related doctrine of accountability. He differentiates between "direct executive" and "explanatory" accountability. Applied to the circumstances where there is an office of Director of Public Prosecutions, Dr. Marshall assumes that the form of accountability will vary according to whether the D.P.P. has been given full delegated powers or not. But this form of delegated authority is not to be confused with the creation of a wholly independent office of D.P.P. In previously rejecting the latter concept, for reasons summarized above, I also regard as untenable the suggestion that the two forms of accountability are in direct contradiction with each other. Explanatory accountability is ever present when questions are asked of the Attorney General on the floor of the legislature. This, in itself, cannot prejudice the right of Parliament to enforce, either directly or indirectly, what is the implied ultimate sanction attached to executive accountability.

(x) There is a real danger in talking abstractly about independence, whether it is in connection with the office of Attorney General, the D.P.P. or the Crown Prosecutor located away from the centre of government. What has to be studied, before drawing any conclusions, is the language of the enactment which defines the powers and duties of the respective state officials. Neither the legal provisions nor the factual realities can be relied upon above. Both

perspectives must be taken into account. In the crunch, it is from the statute law that final enlightenment must be sought.

(xi) Looking at the powers conferred upon a local Crown prosecutor, one of the critical questions to be answered by this Royal Commission is the extent to which such officials should be regarded as "independent, quasi-judicial" officers. If there exists no office of Director of Public Prosecutions or, as is currently the situation in Nova Scotia and in other provinces, there is a D.P.P. (or equivalent title) but the office has no statutory powers or authority, there may exist a large measure of *de facto* independence but in the ultimate analysis the Crown prosecutor is a subordinate officer and is obliged to take directions from the more senior officials in the Department, up to and including the Attorney General.

(xii) A closer look is taken at those jurisdictions which have seen fit to establish a statutory office of Director of Public Prosecutions, thereby necessitating a redefinition of the role and functions of the ordinary Crown prosecutor. Differences are noted as between the Commonwealth of Australia's position on this question, and that reflected in the legislation enacted by Victoria, Queensland and New South Wales. Among the important points of comparison is the permission for, or prohibition against, the Attorney General or Director of Public Prosecutions intervening in the disposition of an individual case.

(xiii) In deciding which of the comparative models is constitutionally preferable, and should be considered for implementation as part of any prosecutorial reforms in Nova Scotia, I begin with the principle that, if the D.P.P. is to be held accountable to the Attorney General for the proper performance of his statutory responsibilities, the Director must have the commensurate discretion to decide questions as to the institution or termination of criminal proceedings. My expectation is that the Director should not expect to wield this power on a regular or frequent basis. If the right policy guidelines are prepared and accepted by the Crown prosecutors it should be truly exceptional to find the D.P.P. (or the Attorney General) becoming personally involved in handling the course of particular criminal proceedings. That remote eventuality, however, must be safeguarded if the Attorney General's own position is not to become an empty constitutional shell.

(xiv) Only in the most exceptional situations should the D.P.P. seriously contemplate becoming actively involved in a particular case. This may occur as a result of his advice being sought by the

Crown prosecutor in charge of the case, or the Director's own determination that his intervention can be justified in retrospect when all the surrounding circumstances are revealed. Invoking his superior authority, in itself, should never be regarded as sufficient justification for such intervention.

(xv) In my judgment, the provisions contained in the Commonwealth of Australia statute come closest to incorporating the principles that should be at the foundation of exercising prosecutorial authority. In conferring the largest measure of independence upon each of the subordinate prosecuting officers the Commonwealth legislation - except in one important instance - ensures that the high price demanded by the doctrine of answerability is amply safeguarded. This is achieved by requiring that not only should any directions or guidelines that emanate from the desk of the Attorney General be reduced to writing and bear the Attorney's signature, but also by insisting that the contents of any such instrument be made publicly known. Both the Attorney General's general guidelines and any specific directive relating to a particular case, issued to the D.P.P. for implementation, have to be made public under the terms of the Commonwealth statute. This means publication in the *Gazette* and also having to be tabled in both Houses of Parliament within a set period of time. For some undisclosed reason, the same conditions are not imposed upon the Commonwealth D.P.P., if and when he decides to intervene in an individual prosecution. Some similar inconsistencies in the D.P.P. legislation enacted by Victoria, Queensland, and New South Wales are also pointed out.

(xvi) What I find lacking in those Australian instances which simply require that the prosecutorial directives be made known in the appropriate annual report to the legislature is the absence of that special bite which is exhibited when the conduct of a Minister or senior official is publicly examined close to the time of its actual occurrence.

(xvii) I strongly support imposing a statutory duty upon both the Attorney General and the Director of Public Prosecutions to make publicly known the reasons for any intervention on their part into the ordinary processes of prosecutorial decision-making. All such directives should be given in writing and bear the personal signature of the official concerned. The most effective platforms for ensuring the widest disclosure of the contents of all such guidelines or directives are those, however inconsistently, chosen by the Australian jurisdictions. I refer to publication in the official *Gazette* and the simultaneous tabling of the same written instruments in the

legislature. Special provision must be made for delaying publication, under appropriate criteria, where unwarranted prejudice may otherwise be caused to innocent parties.

(xviii) To avoid any possible misunderstanding, an attempt is made to define the precise limits within which such public disclosure would be required. This involves giving an interpretation of what is meant when the terms "guidelines" and "directives" are used in my memorandum. There is no intention to limit the process of advice and consultation which ought to be an integral part of every level of prosecutorial authority. I am not advocating that the contents of such advice be always reduced to writing and made the subject of public disclosures. Once, however, the general guidelines are in place, and the delegation of authority has been defined, any intervention from above by way of seeking to dictate how the discretionary power is to be exercised falls squarely with the ambit of a "directive" or "instruction" that must be publicly disclosed.

(xix) Nothing that has been said above should preclude the Attorney General or the D.P.P., personally or through counsel, making a public statement in court by way of explanation as to the decision that has been taken. The same observation applies to the situation where the Attorney General is of a mind to make a formal statement on the floor of the legislature. Examples of both these kinds of initiative have been given in earlier opinions. I see no conflict of principle between the discretionary initiative that has always been at the disposal of the Attorney General "to go public" and the mandatory obligation that, in my opinion, should be imposed by statute to ensure that the written record of the Attorney's or the D.P.P.'s interventions are made available for public scrutiny.

(xx) My final recommendation, echoing pleas that I have made known on other public occasions, is the necessity for making publicly accessible the relevant considerations that enter into the exercise of prosecutorial discretion. So far as I am presently aware, New Brunswick is the first province to have prepared this kind of public document. Its release on May 1, 1987, in both official languages, represents an important milestone in the history of Canada's justice systems, though we may wonder why this country has lagged behind the pioneering efforts of such jurisdictions as the U.S.A., the United Kingdom and Australia. I understand that some of the other provinces, including Alberta and British Columbia, have since followed suit. Not having had an opportunity to study these documents, I cannot express any opinion on their respective merits. Neither am I familiar with the process that was followed in each

province in preparing the contents of the public documents. As I see it, it is of fundamental importance that the rank and file prosecutors should be involved in an active, meaningful way in developing such guidelines. There is nothing inconsistent in denying complete independence of discretionary authority to the ordinary Crown prosecutor while, at the same time, making sure that the maximum opportunity is created for the same line staff to share in developing the guidelines within which each level of responsibility will be expected to function in future.

June 9, 1988

Appendix 1

List of Participants Peer Review Workshop* on "The Role of the Office of the Attorney General"

September 29, 1988

*Each of the Commission's research studies was scrutinized in early draft form by experts in the field, and discussed in a workshop format with the Commissioners and Commission staff, the peer reviewers, and invited professional and community experts.

Researcher:
Professor John Edwards, Faculty of Law, University of Toronto

Reviewers:
1. Gordon Gregory, Q.C., former Deputy Attorney General, New Brunswick
2. Professor Roland Penner, Q.C., Faculty of Law, University of Manitoba, and former Attorney General, Manitoba
3. Marc Rosenberg, Barrister at Law, Greenspan and Rosenberg, Toronto, Ontario

Royal Commission:
1. Chief Justice Hickman, Chairman
2. Associate Chief Justice Poitras, Commissioner
3. Honourable Gregory T. Evans, Q. C., Commissioner
4. George MacDonald, Q.C., Counsel
5. David Orsborn, Counsel
6. W. Wylie Spicer, Counsel
7. Susan Ashley, Commission Executive Secretary
8. Dr. Philip Stenning, Centre of Criminology, University of Toronto, Ontario
9. Professor Bruce Archibald, Faculty of Law, Dalhousie University
10. John Briggs, Director of Research, Chair of the Workshop

Invited Participants:
1. James Bissell, Regional Director, Justice Canada, Counsel to the RCMP
2. Stanley Cohen, Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa
3. Gerald Conrad, Q.C., Executive Director (Legal Services), Department of Attorney General, Nova Scotia
4. Nadine Cooper-Mont, Deputy Solicitor General, Nova Scotia
5. Anne Derrick, Counsel to Donald Marshall, Jr.
6. Chief Superintendent Don Docker, RCMP Headquarters, Ottawa
7. Gordon Gale, Q.C., Director (Criminal), Department of Attorney General, Nova Scotia
8. Martin Herschorn, Director (Prosecutions), Department of Attorney General, Nova Scotia
9. Doug Hunt, Assistant Deputy Minister (Criminal Law), Ministry of the Attorney General, Ontario
10. Chief Superintendent Leahy, C.O. 'H' Division, Halifax, Nova Scotia
11. William MacDonald, Q.C., Deputy Attorney General, Nova Scotia

12. Christine Mosher, Department of the Solicitor General, Nova Scotia
13. Darrel Pink, Counsel to Department of Attorney General
14. Al Pringle, Justice Canada, Counsel to the RCMP
15. Jamie Saunders, Counsel to Department of Attorney General
16. Kit Waters, Director of Policy and Planning, Department of the Solicitor General, Nova Scotia